85-724

Supreme Court, U.S.
FILED
OCT 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

No.

In The

Supreme Court of the United States

October Term, 1985

JOHN C. MANDANICI, JR.
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI

Francis T. Mandanici
55 Trumbuli Street
New Haven, Connecticut 06510
(203) 562-5447

Counsel for Petitioner

I. QUESTIONS PRESENTED FOR REVIEW

I. In a false statement case where the Prosecution alleged that the Petitioner lied concerning his full performance under a Government contract and where the key issue was criminal intent and where the trial court implied that the Petitioner might have given the Government a "Cadillac" for the price of a "Ford", did the court err in not granting a new trial based on the post trial discovery that the Prosecution had earlier unknowingly possessed a requested missing contract exhibit which contradicted the Prosecution and which verified the Petitioner's quid pro quo defense that when he signed the contract he did not have any criminal intent because, as the exhibit revealed, the Government was not fully giving him what it had earlier promised.

II. In a case where the Petitioner was convicted of three closely connected false statement counts of which one was reversed by the Court of Appeals because the jury irrationally found the Petitioner guilty when there was insufficient evidence, should any later review of the evidence concerning a *Brady* and *Bagley* claim on the other counts be in the light most favorable to the Petitioner rather than giving the customary deference to the jury's view of the evidence.

III. In a case where the key issue was criminal intent and which involved three closely connected counts resulting in guilty verdicts, if the jury was irrational and obviously biased on one count, as evidenced by the Court of Appeals reversal of that count due to insufficient evidence, should the Petitioner receive a new trial on the other counts because he was convicted by a jury which returned a verdict which not only showed that the jury was irrational, as in *U.S. v. Powell,* but which also showed that the jury was biased against the Petitioner.

TABLE OF CONTENTS

	Page
I. QUESTIONS PRESENTED	i
II. TABLE OF AUTHORITIES	iii
III. REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS	1
IV. STATEMENT OF GROUNDS FOR JURISDICTION	1
V. CONTITUTIONAL PROVISIONS	1
VI. STATEMENT OF THE CASE	2
VII. ARGUMENT	14
QUESTION I	14
QUESTION II	22
QUESTION III	23
VIII. APPENDIX	A1
COURT OF APPEALS RULING ON PETITION FOR REHEARING	A1
COURT OF APPEALS AFFIRMANCE OF DISTRICT COURT'S RULING	A2
DISTRICT COURT'S RULING ON MOTION FOR NEW TRIAL	A4
COURT OF APPEALS RULING IN RELATED CASE *U.S. v. MANDANICI*, 729 F.2d 914	A13

II. TABLE OF AUTHORITIES

Cases	Page
Ball v. U.S., 470 U.S. ____, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985)	25
Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)	14-16, 21-23
Felton v. U.S., 96 U.S. 699, 24 L.Ed 875 (1877)	17
Illinois v. Gates, 462 U.S. ____, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)	16
Liparota v. U.S., 471 U.S. ____, 105 S.Ct 2084, 85 L.Ed.2d 434 (1985)	17
People v. Shuman, 37 N.Y.2d 302, 333 N.E.2d 363 (1975)	22
Smith v. Philips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982)	23, 25
State v. Rodriquez, 180 Conn. 383, 429 A.2d 919 (1980)	17
State v. Smith, 185 Conn. 63, 441 A.2d 84 (1981)	5, 22
Strickland v. Washington, 466 U.S. ____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	22, 23
Texas v. Brown, 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983)	16
U.S. v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)	14

Page

U.S. v. Bagley, 473 U.S. ____, 105 S.Ct 3375, 87 L.Ed.2d 481 (1985) 13-16, 21-23

U.S. v. Beach, 296 F.2d 153 (CA 4, 1961) 21

U.S. v. Bishop, 412 U.S. 346, 93 S.Ct. 2008, 36 L.Ed.2d 941 (1973) 17

U.S. v. Leon, 468 U.S. ____, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) 21

U.S. v. Mandanici, 729 F.2d 914 (CA 2, 1984) 1, 9, 12, 22

U.S. v. Powell, 469 U.S. ____, 105 S.Ct 471, 83 L.Ed.2d 461 (1984) 24, 25, 26

U.S. v. Quinto, 582 F.2d 224 (CA 2, 1978) 20

U.S. v. Wilson, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975) 25

Constitutional Provisions

Fifth Amendment to United States Constitution 1, 21, 23

Sixth Amendment to United States Constitution 1, 21, 23

Other Authorities

American Jurisprudence 19

Black's Law Dictionary 18

Corbin on Contracts 18, 19

III. REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS

The order of the United States Court of Appeals for the Second Circuit, file No. 85-1028, dated June 7, 1985, affirming the District Court's denial of the Petitioner's Motion for New Trial, is unreported and appears on page A2 of the Appendix. The Ruling of the United States District Court, District of Connecticut, file No. 82-1103 dated January 18, 1985, denying said Motion for New Trial is unreported and appears on pages A4-A12 of the Appendix. The Court of Appeals denial, dated August 29, 1985, of the Petition for Rehearing, is unreported and appears on p. A1 of the Appendix. A related case concerning the Petitioner but for which review is not sought is *U.S. v. Mandanici*, 729 F.2d 914 (CA2, 1984) which appears in the Appendix starting on page A13.

IV. STATEMENT OF GROUNDS FOR JURISIDICTION

The Petitioner seeks a review of the decree of the United States Court of Appeals for the Second Circuit affirming the District Court's denial of a Motion for New Trial, said decree is dated June 7, 1985 and the time of its entry is unrecorded. The District Court's Ruling denying said Motion for New Trial is dated January 18, 1985, and its time of entry is 4:09 P.M. The Court of Appeals denial of a Petition for Rehearing is dated August 29, 1985 and the time of its entry is unrecorded. The statute which confers on this Court jurisdiction is 28 U.S.C., Sec. 1254(1).

V. THE CONSTITUTIONAL PROVISIONS ARE IN PERTINENT PART:

FIFTH AMENDMENT

No Person shall be .... deprived of life, liberty, or property without due process of law....

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and dis-

trict wherein the crime shall have been committed.... to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

VI. STATEMENT OF THE CASE

The Petitioner was indicated on three counts of allegedly making false and fraudulent statements in certain government contracts, in violation of 18 U.S.C., Sec. 1001, (App. p. A23) and on a fourth count of allegedly making a false statement to a bank, in violation of 18 U.S.C. Sec. 1014. In the first three counts, it was alleged that the Petitioner lied in an application for a Section 8 contract, and in two later Section 8 contracts. All three counts concerned the same project involving a Modern Rehabilitations rental subsidy program for the Petitioner's 88 unit apartment house. In general, the program originally called for the Petitioner spending in the aggregate $1,000 per unit in rehabilitation for each of the 88 units for a total of $88,000 and in return he was to receive 120% of the Government's version of the fair market rent for each of the 88 subsidized units.

In Count One it was alleged that the Petitioner lied to the Bridgeport Housing Authority (B.H.A.) concerning the proposed costs of the work he agreed to perform on the apartment house to quality for the federal rental subsidy. In Count Two it was alleged that in a preliminary contract (A.H.A.P.) with the B.H.A., the Petitioner lied when he promised he would perform the $88,000 worth of repair work. In Count Three it was alleged that in a later contract (H.A.P.), the Petitioner lied when he stated all the work had been completed. Said statements were relevant because they constitued the contractual consideration the Petitioner was giving in order to receive the Government's promised consideration of federally subsidized rents. In Count Four, it was alleged that the Petitioner orally lied to a bank.

Prior to the indictment of the Petitioner, the Prosecutor had directed that a grand jury subpoena (Govt. Hearing Exhibit-1) be issued to obtain documents from B.H.A. which was the local fed-

eral agency with whom the Petitioner signed the contracts. Documents were turned over pursuant to the subpoena and reviewed by the Prosecutor. (Hearing Trans. 6/18/84, pp. 55, 57). The A.H.A.P. and H.A.P. contracts (Govt. Trial Exhibits 3 and 4) were among the documents turned over and said contracts contained references to attached exhibits (C and A) which detailed the considerations the Petitioner was to receive for signing the contracts. The contracts were form government contracts which other than said exhibits did not detail any rental figures or consideration. Said exhibits were missing from the Petitioner's copy of the contracts, and his trial attorney, Andrew Bowman, filed a written discovery motion which covered the documents and more importantly, Bowman met with the Prosecutor at least ten (10) times and had at least three (3) discussions concerning discovery, and during these discussions he asked the Prosecutor for the exhibits and attachments to the contracts. The Prosecutor told Bowman that the exhibits were missing and probably did not exist primarily because the B.H.A. did not know what it was doing, and the Prosecutor further related that he didnot have a great deal of faith in the B.H.A. Bowman believed that the Prosecutor had all the Petitioner's matters that the B.H.A. had possessed (Hearing Trans. 6/19/84, pp. 6-10, 28-29).

At trial, the Prosecution's theory of the case was that the B.H.A. promised to give the Petitioner a rental subsidy of 120% of the government's version of the fair market rent in exchange for the Petitioner performing $88,000.00 worth of repairs on his apartment building and taking in lower income families as tenants under a Section 8 program. The Prosecutor argued to the jury that the Petitioner lied about what work he would do and what work he had done because to him the new lucrative contract was a "very desirable, very desirable thing. He got it cheap, ladies and gentlemen. He got it cheap because the government's part of the bargain was 'We will guarantee 120% of fair market rents for fitteen years. And what do we ask in return? We ask that you do this rehabilitation work, and it wasn't done'" (Trial Transcript of February, March, 1983, pp. 1224-1225, said transcript is hereinafter referred to as T.).

Specifically, a key Prosecution witness, David Gonzales, testified that he had been the director of the B.H.A. who had signed the

said contracts (T. pp. 118, 164, 167). He testified that prior to said contracts, the Petitioner was already receiving 110% of the Government's version of the fair market rent pursuant to an earlier program entitled Existing Section 8 (T. pp. 178-179). Under the Existing Section 8 program no rehabilitation or repair was required. Gonzalez testified that the purpose for the Petitioner doing the rehabilitation work was to qualify under said contracts for a new program entitled Modern Rehabilitation where he would receive another 10% of the Government's version of the fair market rent bringing his rental subsidy from 110% to 120% of the said fair market rent for each unit (T. p. 178-179). Gonzalez testified that the Petitioner did receive the 120% of the Government's version of the fair market rents under the new program set forth in said contracts (T. p. 179).

The Prosecution at trial hammered away at the Petitioner's motive for making said alleged false statements to get the extra money. Prior to the Prosecutor's introduction of the total dollar increases in rent which resulted from the new contracts, he argued that "it goes to *motive* as to the switch from Section 8 Existing to Section 8 Moderate Rehabilitation" (T. p. 673) and it "certainly is *relevant* for them (the jury) to know the implications of those false statements if they so find, that is the dollar amount which is connected with them" (T. p. 674). Over the objections of the Petitioner who had argued that only the "rate that he would receive per unit" was important, not the raw rental figures (T. p. 673), the Court allowed the raw total dollar figures concerning rent increases to be introduced (T. p. 675). The Petitioner testified, and the Prosecution's cross examination of him covers almost 300 pages of transcript (T. pp. 840-1123), and primarily concerned the Petitioner's finances. The Prosecution made several points during the cross examination concerning the Petitioner's "pressing need for money" (T. p. 903), his "money crunch" (T. p. 970), his debts and owed taxes (T. p. 990), and how much money he received from the said new contracts (T. pp. 887, 987-988). Also during closing argument, the Prosecutor stressed that the Petitioner was overdrawn on his bank accounts (T. p. 1213), was in "financial difficulty" (T. p. 204), "in financial trouble. He needed the money and

he got it" (T. p. 1254), and the Prosecution stressed that the Petitioner received a substantial increase in rent as a result of the new program (T. pp. 1227, 1254) amounting to "120% of the fair market rents" (T. p. 1224). Thus it was clear that the Petitioner's financial motive was a key to the Prosecution's theory of the case.

The Defense theory was that there was no criminal intent. The Petitioner initially became interested in said contracxts because the B.H.A., at a time when there was a housing shortage (T. pp. 43, 170, 641), promised that it would give him a "much higher rent rate" than he was already receiving under another government subsidy program, and also promised him a rental subsidy of $467 for a two bedroom apartment, and also promised that the $1,000.00 per unit rehabilitation costs to quality for the program would be reimbursed by the government (T. pp. 743, 745, 859, 1147). There were not any lawyers involved (T. p. 809). (At the time, the Petitioner's brother, undersigned counsel, was a full time public defender. See *State v. Smith*, 185 Conn. 63, 441 A.2d 84 (1981).) Nor did the Petitioner read any of the contracts that he signed (T. pp. 807, 810-11, 1119).

Specifically, count two concerned an alleged false promise to do $88,000.00 worth of rehabilitation work in order to later qualify for the program. The Petitioner intended to do that work but he thought that he had a reasonable time to finish it (T. pp. 782, 969, 974, 1117). When he became involved in the program, he did so with the belief that the promised higher rents would provide funding to do the rehabilitation work (T. pp. 975-976, 981, 997998). However, the rents ended up being the same as he had under the prior Existing Section 8 program (T. p. 657) which did not require any rehabilitation. He did not do all the work right away because he did not have the funds, including from higher rents, and there were tenants in the building which hampered the work, especially the electrical work (T. pp. 975-978). Of the $88,000.00 that he initially promised to do, he had spent $55,000.00 on what he believed were rehabilitation matters that would be applied to the $88,000.00 figure (T. pp. 808, 831). Furthermore, subsequent to his purchase of the building in 1978 and prior to the Section 8 contract in 1980,

he spent $600,000.00 on repairs to the building which was empty when he bought it (T. pp. 732-733, 1149). Between the time of the A.H.A.P. contract in December, 1980 (count two) and the H.A.P. contract in July, 1981 (count three), at the request of a person from the B.H.A. to help prepare the file, the Petitioner typed a letter (Government Trial Exhibit 7a) saying the work was all done, and the letter referred to attached bills. However, he never dated the letter or attached any bills and more importantly he kept the original and only gave the B.H.A. a copy (Government Trial Exhibit 7) of the undated letter (T. pp. 779-780). Also, the Clark estimate or alleged "bill" did not come into existence until months after the copy of the undated letter was given and therefore it could not be part of the letter (T. p. 487). Concerning work estimates that he periodically gave to the B.H.A., there was some confusing testimony by Prosecution witnesses that the Petitioner tried to portray two of the many estimates as paid bills. However, that testimony was insignificant when viewed in light of the fact that the Petitioner consistently told the B.H.A. that the work was not done. The B.H.A. personnel who testified for the Prosecution stated that they were told by the Petitioner that the work was not done and they knew the work was not done (T. pp. 181-182, 305, 336, 339, 342, 345, 346, 370). Gambino specifically testifed as a Prosecution witness that when the Petitioner gave him a copy of the undated letter, the Petitioner also told him that the work was not done but would be done (T. p. 305). After the preliminary A.H.A.P. contract of December 1, 1980 (count two), the Petitioner signed a H.A.P. contract of December 12, 1980, which was not a subject of any of the counts of the indictment since it appeared that no one expected him to have finished the work by that time since it was only 11 days after December 1 which was when he made the promise to do the work. The Petitioner believed that said H.A.P. contract of December 12, 1980 gave him 120% of the fair market rents (T. p. 1150). Then later in the July 1, 1981 H.A.P. contract, which is the subject of count three, the units and percentage of fair market rents were lowered.

On the day of the signing of said H.A.P. contract (count three) wherein he allegedly criminally lied concerning work completion

he was first told by Gonzalez that the subsidized units were being reduced from 88 to 79, and he was shown a paper that indicated the new lower rents that he would receive per apartment (T. pp. 1146-1147). Thus not only was the original $88,000 figure based on 88 units being unilaterrally reduced to a ceiling of $79,000 for 79 units but it would appear to anyone that the original $1,000 figure per unit was also being unilaterrally reduced by the B.H.A. because it was giving less rent per unit than originally promised if $1,000 per unit had been spent. There was no attorney (T. p. 809). He had been promised $467 monthly rental for a two bedroom apartment but was told that he was now to get $317 monthly rental (T. pp. 859, 1129-1130, 11471148). He was "dumbfounded" by the big difference (T. p. 1148). Gonzalez told him if he did not sign the contract then the 70 plus lower income families whom the B.H.A. had already moved into the building would become his sole responsibility (T. pp. 1147-1149). Even though the B.H.A. had broken its promise by giving him lesser rents, later in that month of July, 1981, as a prosecution witness testified, (T. pp. 233, 237), the Petitioner ordered and received $6,000 00 in screens pursuant to the earlier agreed rehabilitation. The re ts that the H.A.P. contract was giving him were less than the regular non Section 8 tenants were paying in the apartment house (T. pp. 1129, 1147). There was at the time and still is a housing shortage in the area and even the Prosecution's witnesses testified to that fact (T. pp. 43, 170). The Petitioner's apartment building was a good building (T. pp. 639, 946) and he could fill it up with regular tenants paying higher rents. The present Section 8 director testified that he could have easily filled up the building with tenants in the earlier Existing Section 8 program (T. pp. 678-679). That program did not require any rehabilitation expenditures.

Since the Petitioner had not read the contracts, and neither was told why he was getting lesser rent, he could not testify that he knew that the technical reason why he was getting lesser rent was because he had not completed the work (T. p. 1156). However, he agreed with the court after reading while on the witness stand the pertinent part of the contract that such a reason was a provision of the contract (T. p. 1156). As to the missing exhibits concerning the rent

the Petitioner was to receive, the trial court at the near end of the trial inquired as to the location of the exhibits but the Prosecution stood moot on the matter and defense counsel stated he never saw the exhibit (T. p. 1165). The Petitioner testified that his only contact with anything relative to said exhibit was when he was shown a paper with the rents on it by Gonzalez when he signed the H.A.P. contract in July, 1981, but he never came into possession of that document (T. pp. 1168-1169).

Thus in essence the defense was that there was in the mind of the Petitioner a quid pro quo which negated any criminal intent. Even the trial court suggested that this could be an appropriate belief because the court stated that its general understanding of Section 8 contracts was that if the landlord did not do all the work the "rents would be lower" (T. p. 1164). The court stated that the Section 8 contracts were designed by the government to attract landlords and were contracts that were "very flexible" and "extremely flexible" (T. p. 1164). The court even tentatively stated that "these contracts don't call for criminal remedies. This is a civil contract. I mean its a contract with civil ramifications" (T. p. 1165-1166).

However, the court let the matter go to the jury after instructing them as to the necessity of the Prosecutors proving criminal intent (T. pp. 1287-1290) and also instrucing them that "if you find that a witness has deliberately lied on one material subject, it is only natural that you should be suspicious of the testimony of that witness on all subjects. Under these circumstances, you're entitled to disbelieve the witness' entire testimony" (T. p. 1283). The jury found the Petitioner guilty on Counts one, two and three (the Section 8 counts) and not guilty on count four (the bank count). There were two sentencing hearings. The Court observed that "I'm not sure we even have a fraud in the sense of a fraud statute and certainly we don't have a crime of tha magnitude" (Sentencing trans. of 6/17/83 p. 46). The Court also noted that the Petitioner had pursuant to the contracts provided very good, decent and comfortable housing to poor people at a time when there was a dire need of housing in the area (Sentencing trans. of 6/17/83 pp. 47, 43-44, 6/10/83 pp. 8, 26). As to the quality of the housing provided by

the Petitioner, the Court clearly implied that perhaps the Government was paying "Ford" prices for "Cadillac" quality housing, and the Court clearly implied that the Petitioner perhaps did not "gyp the Government out of anything" (Trans. 6/10/83, pp. 24-25). The Court also observed that regardless of the legalities of the contracts, the Petitioner was entitled to receive rental payments from the Government based not on the contract prices but on "quantum meruit", and the Prosecutor agreed (Trans. 6/10/83, pp. 22, 24, 25). The Court also noted that the Petitioner had "spent fiftyfive thousand (dollars) or thereabouts" on repairs (Trans. 6/10/83, pp. 5-6).

The Petitioner filed an appeal and the Second Circuit Court of Appeals affirmed the guilty verdicts on counts two and three, and reversed the guilty verdict on count one *U.S. v. Mandanici*, 729 F.2d 914 (1984). The Court ruled that there was "no evidence in the record from which a rational juror" could have found the Petitioner guilty on count one which concerned an alleged false statement in the earlier Section 8 application. However, the Court in affirming the other two counts concerning a sufficiency of evidence claim, specifically noted that it was "(v)iewing the evidence in the light most favorable to the government." 729 F.2d at 919. (App. p. A22).

Approximately one month after the said appellate decision and approximately one year after the trial, the F.B.I returned to the B.H.A. a rent calculation which constituted the missing exhibit of the contracts and which showed that the Petitioner was telling the truth when he testified that he believed when he signed the July, 1981 H.A.P. contract (Count 3) he was getting less than the B.H.A. had promised. When the Defense learned that the F.B.I. had returned the missing exhibit, a Motion For New Trial was filed, dated April 26, 1984. At the hearing on said motion, the following facts were established. James Grantham testified that he was the current coordinator of the Section 8 program for the B.H.A. and that on March 13, 1984 (one year after the trial), pursuant to his recent request,he received back from the F.B.I. a box of B.H.A. papers that the Prosecution had subpoenaed during the investiga-

tion of the Petitioner (Hearing Trans. 6/19/84 pp. 58-60). In the bottom of the box, was a rent calculation (Petitioner's Hearing Exhibit D) which he found among some loose papers (Hearing Trans. 6/19, pp. 59-62, 72-73). The rent calculation contained the rents that the Petitioner was receiving from the B.H.A. under the H.A.P. contract of July 1, 1981 (Count 3) (H.T. 6/19 p. 72). The box, Petitioner's Hearing Exhibit A,measured 18 inches long, 10 inches high, and 12 inches deep. John D'Amelia initially testified for the Petitioner. He stated that he is a Section 8 housing consultant who was working with the B.H.A. when, along with Mr. Grantham, in March 1984, he reviewed the said box of documents and in the bottom of the box among loose papers was the Petitioner's rental calculation (H.T. 6/19 pp. 95-98). The Prosecution, over the objection of the Petitioner, then qualified D'Amelia as its own expert witness (H.T. 6/19 pp. 100-106). The Prosecution's expert D'Amelia testified that the said rent calculation is a backup to and part of Exhibit C of the A.H.A.P. contract (Count 2) and without said rent calculation the rents cannot be ascertained (H.T. 6/19 pp. 106-107, 113). He further testified for the Prosecution that the rent calculation is part of the A.H.A.P. contract and should be stapled to it, and testified that the A.H.A.P. contract is not complete unless it has either Exhibit C or its backup, the rent calculation (H.T. 6/19 pp. 113-114, 137). He further testified that the rent calculation is not included in Exhibit A of the later H.A.P. contract which also states the rents, because it is assumed that it is already in the A.H.A.P. contract as Exhibit C (H.T. 6/19 p. 138). Also, if the H.A.P. contract is missing Exhibit A (concerning rents) then it is not a complete contract (H.T. 6/19 p. 138).

Andrew Bowman, the Petitioner's trial attorney, testified that the main defense at trial was lack of criminal intent (H.T. 6/19 p. 16). Bowman testified that he had had meetings with the Prosecution concerning his discovery requests, and that he had requested discovery of the exhibits to the contracts (H.T. 6/19 pp. 2-3). The Court sua sponte noted that there was "no doubt" in its mind that the Prosectuion would have disclosed the rent calculation to the Defense if the Prosecution knew that it existed (H.T. 6/19 p. 4) and the Court further noted that as "far as relevance and to be turned

over under the motion for discovery, I will tell you now I accept that they should have been turned over" (H.T. 6/19, pp. 4-5). Petitioner's counsel then immediately asked the Court if the rent calculation was covered by a particular paragraph in the written motion and the Court responded: "Yes, I think Mr. Bowman is looking for each document on counts, one, two, and three upon which the government would rely. What's relevant to Mr. Mandanici's file, so to speak, that was in the housing authority's possession." (Hearing Trans. 6/19, p. 5). Bowman further testified that he met with Prosecutor Pickerstein at least 10 times and had at least 3 discussions concerning discovery, and during these discussions he asked Pickerstein for the exhibits and attachments to the H.A.P. contract of July 1, 1981 (H.T. 6/19 pp 6, 8, 28, 29). He was shown documents set out on a table by the Prosecutor but never was shown the rental calculation or any exhibits to the contracts concerning rent, nor did he mention that he ever was shown a box (H.T. 6/19, pp. 5-8). When he requested the exhibits that were missing from the contracts he was told by Pickerstein that the missing exhibits probably did not exist primarily because the B.H.A. did not know what it was doing, and he was told by theProsecution that it did not have a great deal of faith in the B.H.A. (H.T. 6/19, p. 29). Bowman believed that the Prosecutor had all the Petitioner's matters that the B.H.A. had possessed (H.T. 6/19, pp. 9-10). Bowman never saw the rent calculation until April 19, 1984 (H.T. 6/19, p. 14) which was one year after the trial.

James Pickerstein, the trial Prosecutor, testified that he was in charge of the investigation of the Petitioner (H.T. 6/18, p. 54) and that he had directed that a grand jury subpoena (Government Hearing Exhibit 1) be issued for David Gonzalez, regarding the Moderate Rehabilitation Program (H.T. 6/18, p. 55). Documents were turned over pursuant to the subpoena (H.T. 6/18, p. 55). Prior to the grand jury indictment of the Petitioner, Pickerstein was "sure" that he reviewed the subpoenaed materials that Gonzalez had provided, but then he testified that he did not know if he went through the subpoenaed materials (H.T. 6/18, p. 57). He testified that Bowman came to his office one day to look at the Petitioner's B.H.A. file and he had that file produced for Bowman for his

examination (H.T. 6/18, pp. 66-67, 96-97). He first testified that he could not say whether prior to trial he ever saw the box or the rent calculation, or whether the Prosecution ever possessed them prior to trial (H.T. 6/18, pp. 56, 58-60), but he testified that he "may well have seen" the rent calculation and thought it "irrelevant" (H.T. 6/18, p. 60). He testified that if he knew of the rent calculation (which showned 114% of the fair market rent) prior to trial he was not sure if he would have revealed it to Bowman (H.T. 6/18 pp. 99-101).

Paul Fitzgerald testified that he was the F.B.I. case agent responsible for the Petitioner's case and had served a grand jury subpoena on David Gonzalez and he observed that the subpoenaed documents were in a box and he delivered the box and David Gonzalez to the grand jury (H.T. 6/19, pp. 149-151). He knew that exhibits from the contracts were missing from the folders concerning the Petitioner which were in the box (H.T. 6/19, pp. 156-157). He never saw the rent calculation until a short time prior to the hearing (H.T. 6/19, p. 170). Prior to trial he discussed the missing exhibits with Pickerstein who asked him about the location of the missing exhibits, and he told Pickerstein that the exhibits never were prepared (H.T. 6/19, pp. 167-168). Although he knew documents were missing,he never looked in the bottom of the box but just assumed that all matters concerning the Petitioner were in the two folders of his in the box (H.,T. 6/19, pp. 152-153, 156-157, 162). On one occasion he removed the Petitioner's folders from the box and brought them to an office for Attorney Bowman to review but he could not recall telling Bowman about the box (H.T. 6/19 pp. 159-160).

In said Motion For New Trial, dated April 26, 1984, and filed shortly after the original appellate decision, the Petitioner also raised the issue that he should receive a new trial because he was convicted by a jury that was not "fair, impartial,competent, capable, and rational," as evidenced by the recent appellate decision reversing count one because there was "no evidence in the record from which a rational juror could" have found the necessary infer-

ences to rationally convict the Petitioner on that count. See *Mandanici*, 729 F.2d at 920. (App. p. A24).

The trial court in a Ruling filed January 18, 1985, denied the Motion For New Trial based on both claims (undisclosed evidence and irrational jury) (Ruling, App. pp. A4-A12) The Court of Appeals For the Second Circuit (Meskill J., Newman J. and Kearse J.) on June 7, 1985 in a per curiam decision affirmed without comment the trial court's denial (App. p. A2). A Petition For Rehearing With Suggestion For Rehearing En Banc was filed on June 21, 1985. Said Petition referred to the case of *U.S. v. Bagley* which was then pending before this Supreme Court. The Petitioner requested that no action be taken on the Petition until *Bagley* was decided. On July 2, 1985, this Court's decision in *Bagley* was released. 473 U.S. ____, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). On July 18, 1985, the Petitioner filed in the Court of Appeals, a Motion To File Amended Petition For Rehearing With Suggestion For Rehearing En Banc in order for him to fully argue that the recent *Bagley* decision strengthened his claim for a new trial. Twenty-five (25) copies of the Amended Petition with a full *Bagley* argument were filed with the Motion To File the said Amended Petition. On August 23, 1985, the three judge panel denied the Motion To File the Amended Petition and the twenty-five (25) copies of the Amended Petition were returned to the Petitioner. In the Panel's denial, it referred to Sec. 28(j) of the Federal Rules of Appellate Procedure concerning notifying the court by letter of any recent cases. On August 27, 1985, Petitioner sent the Court of Appeals such a letter but said letter, and its copies were also returned because by the time it was docketed, the original Petition For Rehearing was denied. That denial of the Petition For Rehearing was on August 29, 1985. (App. p. A1) Thus, none of the Petitioner's arguments concerning the *Bagley* decision of this Court were ever considered by the Court of Appeals because all said papers containing said arguments were returned to the Petitioner.

VII. ARGUMENT

QUESTION I (Brady and Bagley Claim)

The Motion For New Trial primarily was based on the undisclosed rent calculation and relied on the cases of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and *U.S. v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). The trial court ruled that the rent calculation revealed that the Petitioner received 114%, not 120%, of the fair market rent (App. p. A6) but also ruled that *Brady* and *Agurs* did not apply because although the Prosecution physically possessed the undisclosed rent calculation in a box, it did not *know* it had the rent calculation (App. pp. A5-A8). Therefore, instead of applying the moderate standards of materiality warranting a new trial under *Brady* and *Agurs*, the trial court proceeded to apply the standard of Rule 33 of the Federal Rules of Criminal Procedure. That Rule 33 standard poses a greater hurdle for a Petitioner. That standard, as the trial court noted, requires the Petitioner to demonstrate that the newly discoverd evidence "would probably lead to an acquittal" (App. p. A8). In *Argurs*, this Rule 33 standard was described as a "severe burden" on the Defendant, *Id.* at 111, also fn. 19. The trial court applied this severe standard and denied the Motion for New Trial.

Furthermore, it should be noted that the trial court in Footnote 2 observed in passing that even if *Agurs* did apply, its moderate standard of materiality involved when there is a specific request for the evidence did not apply because the Defense failed to make a specific enough request to trigger that standard. The Trial Court ruled that a request for all contract documents is not a specific request for contract exhibits. The Court observed therefore that if *Agurs* applied, only the third standard involving generalized requests was involved. The Court described that standard as a "relatively high standard of materiality". Applying this high standard, the Court reaffirmed its denial of a new trial. (Footnote 2, App. p. A11).

However, *Bagley*, which was released after the trail court's decision, holds that the *Brady* moderate standard of materiality, as

reformulated in *Bagley*, should be used in situations like the Petitioner's rather than the more severe Rule 33 standard. Concerning any specific knowledge by the Prosecutor that he possesses the undisclosed evidence, in *Bagley* it was specifically noted that the Prosecutor did not know of the existence of the missing evidence. *Id*, 105 S.Ct. 3375, 3378, footnote 4. Thus the *Brady* and *Bagley* standard of materiality applies, as in the present case, when the Prosecutor does not know that the Prosecution possesses the evidence. In *Bagley*, the Prosecutor not only did not know of the evidence but never possessed it, while in the present case it is undisputed that the Prosecutor possessed the evidence in a box that he personally controlled. *Bagley* also rejects the contention that there must have been a precise specific request for the undisclosed evidence in order to trigger its moderate flexible standard of review. In *Bagley* the pre trial request did not "technically" constitute a specific request or precisely correspond to its missing exhibit. *Id.* 105 S.Ct. at 3384. Similarly in the present case the Defense request for contract documents did not technically specify the contract exhibits by letter (A or C) but the trial court itself ruled that it was clear that the Defense was "looking for" the missing rent calculation and made a discovery request which covered the missing evidence (Hearing Trans. of 6/19/84, pp. 3-5). *Bagley* holds that a specific request is not a prerequisite but just a circumstance to be considered when applying its flexible moderate standard of materiality. *Id.*, 105 S. Ct. at 3384, 3385.

Thus, instead of the severe and high standards of materiality used by the trial court in reviewing the matter, the *Brady* standard, as reformulated in *Bagley*, should apply. The principles of *Bagley* should control the present case because although this is a collateral attack on a judgment, all *Brady* and *Bagley* claims for a new trial are essentially post trial collateral attacks on a judgment since new evidence is usually discovered after judgment. Accordingly, *Bagley* should apply to other collateral attacks pending when *Bagley* was decided.

The standard in *Bagley* which should apply to this case is a "flexible" standard whereby if evidence is undisclosed by a Pros-

ecutor, a new trial is dictated if "there is a reasonable probability, that, had the evidence been disclosed to the defense, the *result* of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome" 105 S.Ct. 3384 (emphasis added). The standard employed by the trial court was much harsher on the Petitioner because said standard required the Petitioner to demonstrate that the new evidence would probably lead to an *acquittal* on all charges. The *Bagley* standard was described as a "reformulation of the *Brady* rule", 105 S. Ct. at 3400 (Stevens, J., dissenting). Said standard dictates that a new trial is required if the Defendant can show that the new evidence probably would lead to a different "*result*" -- such as a hung jury declared by the jury to be hung, a hung jury declared by the Court to be hung because of the length of its deliberations, a mistrial, etc. Under *Bagley*, the Petitioner need not climb the almost insurmountable mountain of demonstrating that said new evidence would probably lead all twelve jurors to *acquit* him.

Also, the term "probability" does not mean that the Petitioner must make a prima facie showing. The term probable, as generally defined with reference to probable cause, "does not demand any showing that such a belief (in the probability) be correct or more likely true than false" *Texas v. Brown*, 460 U.S. 730, 103 S. Ct. 1535, 1543, 75 L.Ed.2d 502 (1983). *Bagley* also mentions that in assessing such a reasonable probability of a different result, the court should consider the "totality of the circumstances" 105 S. Ct. 3384. This Court has noted in a similar situation that when a court assesses whether the Prosecution has shown that *probable* cause existed for a warrant, the court should also view the matter in the "totality of the circumstances" and the court should find the Prosecution's burden to have been met when he has presented "only the probability, and not a prima facie showing, of criminal activity. . . ." *Illinois v. Gates*, 462 U.S. ____, 103 S. Ct. 2317, 2329, 2330, 76 L.Ed.2d 527 (1983). A court should be just as willing to accept the Petitioner's showing of probability as it does the Prosecution's showing of probability. Certainly reasonable men and women can differ on many things such as the materiality of an undisclosed exhibit. However, the *Bagley's* standard encompasses

those different opinions because it only requires the Petitioner to show a probability, not prima facie proof, that a different result would have occurred. In a case such as the present one where the key issue concerned any criminal intent, then such a showing of a probability of a different result is easier made than in cases involving other elements. "The state of mind of one accused of a crime is often the most significant and, at the same time, the most *elusive* element of the crime charged" *State v. Rodriquez*, 180 Conn. 382, 404, 429 A.2d 919, 929 (1980).

Concering intent, the crime charged in the present case, 18 U.S.C., Sec. 1001, (App. p. A23), requires the Prosecution to prove beyond a reasonable doubt that the Defendant *knowingly and willfully* made false and fraudulent statements. In a false I.R.S. statement case, this Court held that the term willfully "generally connotes a voluntary, intentional violation of a known legal duty", and involves "bad faith or evil intent" or "evil motive or want of justification..." *U.S. v. Bishop*, 412 U.S. 346, 360-361, 93 S. Ct. 2008, 2017, 36 L.Ed.2d 941 (1973). In *Felton v. U.S.*, 96 U.S. 699, 702, 24 L.Ed. 875 (1877) the terms knowingly and willfully were described as requiring a "bad intent", a "bad purpose", and "evil intent without justificable excuse". See *Liparota v. U.S.*, 471 U.S. ___, 105 S. Ct. 2084, 2088, 85 L.Ed.2d 434 (1985).

At trial, the strongest argument that the Petitioner had was that he believed that when he signed the contract he could finish the promised work in the future. (Even a prosecution witness testifed that the Petitioner spent $6,000.00 on rehabilitation costs on July 15, 1981 which was after the last contract on July 1, 1981 (T. pp. 233, 237). The contract which he signed without reading contained a representation that the work was completed and this allegedly constituted the false and fraudulent statement. (Count 3). However, in addition to his belief about future completion, the Petitioner also testified at trial that prior to signing the contract he was shown the rent he was getting and it was much less than originally promised by the government (T. pp. 1146-1148, 859, 1129-1130). He was originally promised 120% of the Government's version of the fair market rent if he did a certain amount of rehabil-

itation to qualify for the program and the government agent who prepared the form contract testified as a prosecution witness that the Petitioner did receive the 120% of said fair market rent (T. pp. 178-179).

However, the Petitioner had no undisputed evidence to substantiate his claim that when he signed the contract he was getting less than originally promised. The newly disclosed rent calculation undisputedly reveals that the Petitioner only received 114% of the fair market rent rather than 120% (Ruling, App. p. A6). Thus the Petitioner only received **70%** of that which he was originally promised in extra rent above the fair market rent (14 is 70% of 20). The Court at sentencing observed that the Petitioner spent approximately $55,000.00 of the $79,000.00 that he was supposed to spend on rehabilitation under the contract. (Sentencing Trans. of 6/10/83, pp. 5-6, 11). The figure was $79,000, not $88,000, because the units were cut from 88 to 79. Thus the Petitioner did **70%** of what he was supposed to do ($55,000.00 is 70% of $79,000.00). Thus there was a precise quid pro quo negating any evil intent or evil motive since the Petitioner was getting, as he so testified, less than originally promised.

This defense that the Petitioner was not acting fraudulently nor doing what the law forbids because in his mind he was only getting fair value and what he deserved is a defense based on the common law principles of quantum meruit and quid pro quo. Quantum meruit has been recognized at common law for centuries. It basically means "as much as he deserves" *Black's Law Dictionary*. It is akin to the concept of quid pro quo which means "something for something" *Black's Law Dictionary*. Quid pro quo is also seen as an "exchange of equivalents" *Corbin on Contracts*, West Publishing Co., 1963, Vol. 1, Sec. 10, p. 22. The issue in the present case concerns alleged fraudulent criminal intent in a civil contract and whether the Petitioner did what he knew the law forbids and whether he had the fraudulent intent to deceive and cheat.

Common law recognizes that a party to a contract who himself is in default, even in substantial default, but who has rendered a

"part performance of value" has a right to seek compensation if he can show that he has "done more good than harm" to the other party and that the other party would be "unjustly enriched" if he were "allowed to retain the beneficial part performance without paying anything in return" *Corbin* Vol. 5a, Sec. 1124, p. 12. The defaulting party has a right to the "reasonable value of his part performance" and that recovery is upon quantum meruit. *Corbin*, Vol. 5A, Sec. 1124, pp. 14-15, including footnote 16. Also of relevance is the common law's recognition that written contracts can be modified, and conditions in and breaches of the contracts can be waived, and also that a substitute performance can be accepted. "It is also competent for the parties to a contract to vary its terms by a subsequent course of dealing" *17 Am. Jur. 2d. Contracts*, Sec. 466, p. 937.

Even the trial court suggested at sentencing that the Petitioner was entitled to receive some rent based on quantum meruit and the Prosecution agreed. Also, the trial court at sentencing noted that there was a housing shortage and suggested that perhaps the B.H.A. did not get "gyp(ed)" and possibly got a "Cadillac" when it only paid for a "Ford". (Transcript of June 10, 1983, pp. 2226). The trial court had also noted at trial that Section 8 contracts were designed by the government to induce and attract landlords and were "extremely flexible" and allowed a working relationship between the parties, and allowed less rent be given for less work done. (T. pp. 1164, 1166). It is important to note that the Petitioner had consistently told the B.H.A. that the work was not completed and the B.H.A. knew that. (T. pp. 181-182, 305, 336, 339, 342, 345, 346, 370).

The rent calculation does not itself state that the 114% was based on $55,000.00 but rather states that the 114% for the 79 units was based on $79,000.00 being spent. This violated the earlier agreement between the parties that 120% of the fair market rent would be given for each unit if $1,000.00 per unit in rehabilitation was performed. However, the Petitioner was never told why he was getting less nor did he study the document when it was shown to him. The importance of the rent calculation is that it verifies the

Petitioner's testimony that he was getting less rent than promised and that affected his intent at the signing of the contract. The fact that H U.D. and the B.H.A. arbitrarily lower the rents and violate earlier promises is not of direct significance. What is important is that the Prosecution was able, in the absence of the rent calculation, to successfully present and argue to the jury that the Petitioner because he was in debt (T. pp. 1204, 1213, 1254) lied to get the extra money (T. p. 1254) and did so with criminal intent because he knew he did not deserve the full extra money because he did not fully do all the work. The Prosecution argued to the jury that to the Petitioner this contract was a "very desirable, very desirable thing. He got it *cheap* ladies and gentlemen. He got it *cheap* because the government's part of the bargain was 'we will guarantee *120%* of the fair market rents for fifteen years. And what do we ask in return? We ask that you do the rehabilitation work and it wasn't done." (T. pp. 1224-1225) (emphasis added).

However, the Petitioner could not effectively rebut the Prosecution's argument that he was getting the full 120%. As a result the defenses based on a quid pro quo and quantum meruit as they related to the lack of "evil motive" or "bad purpose" or "evil intent without justificable excuse" were never fully presented to the jury. It is important to note that the rent calculation, as a physical document, would have had an almost irrefutable impact on the jury. See *U.S. v. Quinto*, 582 F.2d 224, 235 (CA 2, 1978).

Furthermore, although the rent calculation was part of the H.A.P. contract which was the basis of Count 3, the omission of it had a substantial influence on Count 2 which was based on the earlier A.H.A.P. contract. The later rent calculation with its lowered figures of 79 units and $79,000, reveals that these contracts were viewed by both parties as flexible and that the earlier $88,000.00 figure promised in Count 2 was never intended to be cast in stone. More specifically, Sec. 1.5(a)(2) of the A.H.A.P. contract (Count 2) specifically mentions that the cost of the work could be less than originally expected. Also the rent calculation has a direct effect on the Petitioner's overall credibility which was severely attacked by the Prosecution. The Court instructed the jury on credibility and told

them that if they disbelieved the Petitioner on one matter, they could use that to disbelieve him on other matters (T. pp. 1283). Obviously the jurors disbelieved the Petitioner's testimony on Count 3 and certainly that affected them on their assessment of his testimony on Count 2 and visa versa. It has been observed that "jurors minds are not that easily compartmentalized" and that their decision on one count affects their decision on other counts. *United States v. Beach*, 296 F.2d 153, 159, 160 (CA 4, 1961).

Thus the Petitioner should receive a new trial on Counts two and three because his rights to due process and to a fair trial, as guaranteed by the Fifth and Sixth Amendments to the United States Constitution have been violated by the nondisclosure. The Petitioner's right to effective assistance of counsel, as protected by the Sixth Amendment, has been violated because without the rent calculation, Defense counsel was substantially curtailed in presenting a defense. There was at least a reasonable probability that with the rent calculations, the result of the trial would have been different. Certiorari should be granted because the lower court's decision in the present case is in conflict with *Bagley* and *Brady*. The "criminal justice system's truth seeking function" is paramount enough to warrant the admission of evidence that was once in the hands of a defendant but taken from him by means of a technical constitutional violation; *U.S. v. Leon*, 468 U.S. ____, 104 S. Ct. 3405, 3413, 82 L.Ed.2d 677 (1984). Since the truth is paramount, the Defense should also have the right to a trial to present all relevant evidence that was in the hands of the Prosecution prior to and during trial. Finality of judgments and the exlcusionary rule are major components of the criminal justice system but the truth is paramount.

QUESTION II (Viewing the Evidence in the Light Not Most Favorable to the Prosecution)

Bagley raises another issue which strengthens the Petitioner's claim for a new trial. *Bagley*, 105 S.Ct. at 3383-3384, adopts the standard of materiality utilized in *Strickland vs. Washington* 466 U.S. ____, 104 S.CT 2052, 80 L.Ed.2d 674 (1984). In *Strickland, Id* at 2068, it was held that: "In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law . . . . The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision."

Such an assumption can not be made in the present case because prior to the disclosure of the rent calculation there was a consistent attack on the sufficiency of the evidence on all counts (T. pp. 604-620, 1194-1195, *Mandanici*, 729 F.2d 920). The Petitioner succeeded in his attack on Count one as evidenced by the Court of Appeals' reversal of that count because there was "no evidence in the record from which a rational juror" could have found him guilty, 729 F.2d at 919-920. (App. p. A24). Thus in the present case, unlike *Bagley* and *Strickland*, a reviewing court should not give its customary deference to the jury's original assessment of the evidence but rather since this jury was at least partially irrational, then a reviewing court should be inclined to review the evidence in the light most favorable to the Petitioner. This is the procedure utilized in some other post trial reviews. See *State v. Smith*, 185 Conn. 63, 77, 441, A.2d 84 (1981), *People v. Shuman*, 37 N.Y. 2d 302, 304, 333 N.E.2d 363 (1975).

Also, it must be noted that the Court of Appeals in reversing that Count and affirming Counts two and three reviewed the evidence in the "light most favorable to the government" 729 F.2d at 919. (App. p. A22). However, a *Brady* review of the evidence should not be performed like a sufficiency review and the Petitioner has claimed that one of the Trial Court's errors was that it partially

referred to the pro Prosecution factual findings of the Court of Appeals reached by that Court when it was making a sufficiency review and not a *Brady* review (App. p. A9).

Thus neither the Trial Court or the Court of Appeals ever reviewed the evidence in the light most favorable to the Petitioner which should be done in this case because it can not be assumed that the jury's original assessment of the evidence was "according to the law" or that the jury acted "reasonably conscientiously, and impartially" *Strickland, supra.* Thus certiorari should be granted because the lower court's decision conflicts with the principles of *Bagley* and *Strickland.*

QUESTION III (Conviction By an Irrational and Biased Jury)

The three Section 8 counts were closely related and involved the same project and parties. The Court of Appeals ruled that no rational juror could have found the Petitioner guilty on the first Section 8 count because there was insufficient evidence. 729 F.2d at 920. (App. p. A24). Thus it is clear that the jury was irrational on that count and refused to follow the trial court's instructions. The Petitioner has a right to a fair and impartial jury pursuant to the Sixth Amendment. He also has a due process right to a capable jury under the Fifth Amendment. "Due process means a jury capable and willing to decide the case solely on the evidence . . . ." *Smith v. Phillips,* 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). It should be noted that surely the right to a competent jury is as fundamental a constitutional right as the right to a competent attorney. A Defendent has a constitutional right to a "reasonably competent attorney" *Strickland, supra,* 104 S.Ct. at 2064-2065.

In the present case the jury's verdict of guilty when there was no evidence reveals a clear bias against the Petitioner and for the Prosecution. This is not a situation where the verdict could go either way, but rather it is a situation where even when the evidence is viewed in the light most favorable to the Prosecution, the verdict could only be an acquittal. Thus even if a juror was biased toward

the Prosecution, and always viewed the evidence in a light most favorable to the Prosecution, such a juror could not logically reach a guilty verdict. To reach such a verdict the juror must have gone beyond being biased toward the Prosecution and reached a point where the bias was compounded by total irrationality. The Petitioner was entitled on all counts, even if guilty, to a trial by a fair, impartial, unbiased, and capable jury. Since the jury's verdict on the first count reveals its inherent irrationality and bias against the Petitioner, then the Petitioner should receive a new trial on the other counts since he was convicted on those counts by the same biased and irrational jury.

If the jury's verdict was only inconsistent without revealing any inherent bias against the Petitioner, or if the Prosecution was unable to further appeal the Court of Appeals' reversal of Count One, then perhaps a new trial would not be warranted. In *U.S. v. Powell*, 469 U.S. ____, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984), it was noted that a new trial is not warranted merely because a jury returns inconsistent verdicts on different counts. In *Powell*, there was no initial claim or ruling that the evidence was legally insufficient to justify a guilty verdict on any of the counts. Rather the claim was merely that the verdicts were based on inconsistency rather than insufficiency. It was noted that inconsistent verdicts "present a situation where 'error', in the sense that the jury had not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored . . . . For us, the possibility that the *inconsistent verdicts may favor the criminal defendant* as well as the Government militates against review of such convictions at the defendant's request. . . . . The fact that the inconsistency may be the result of *lenity* coupled with the Government's inability to invoke review, suggests that inconsistent verdicts should not be reviewable" 105 S.Ct. at 477. (emphasis added)

The two (2) reasons on which this Court based its decision not to review the verdict in *Powell* are lacking in the present case. The jury's verdict of guilty in Count One, when the evidence was clearly insufficient, can not be given some ambiguous interpretation reflecting possible lenity toward the Petitioner. This jury returned

a verdict against the Petitioner which even a jury which viewed the evidence in the light most favorable to the Prosecution could not return. This guilty verdict when there was absolutely no evidence reflects not only the irrationality present in *Powell* but also reflects a clear and substantial bias against the Petitioner which was not present in *Powell*.

Also, unlike the Prosecution's situation in *Powell* where it would not invoke review, the Prosecution in the present case can attain a review. As to the jury's verdict of guilty, the Prosecution would certainly not seek a review of that although the Defense would certainly welcome any effort to attack the guilty verdict. Thus, the key matter which the Prosecution might seek a review is not the jury's guilty verdict but rather the later court's reversal of that verdict because of insufficient evidence. Clearly the Prosecution can further appeal any decision of a court which overturns a jury verdict. See *U.S. v. Wilson* 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2D 232 (1975). Furthermore, it should be noted that, unlike *Powell* the present situation was caused by the Prosecution which chose to submit to the jury a count which was not supported by any evidence. Perhaps this was trial strategy for it has been noted that the "Prosecution's ability to bring multiple charges increases the risk that the defendant will be convicted on one or more of those charges. The very fact that a defendant has been arrested, charged, and brought to trial on several charges may suggest to the jury that he must be guilty of at least one of those crimes. (citation omitted)" *Ball v. U.S.*, 470 U.S. ____, 105 S.Ct. 1668, 1675, 84 L.Ed.2d 740 (1985) (Stevens J., concurring). If a Prosecutor gambles by adding weak charges to increase the chances of some conviction, then he has no right to complain if the later result of adding those charges is a new trial.

Thus the Petitioner's constitutional rights have been violated and this Court should grant certiorari because the lower court's decisions are in conflict with the general principles set forth in *Smith v. Phillips, supra*. Also, this is an important question of federal law and the case raises similar concerns as those presented in *U.S. v Powell, supra*. Also, besides the constitutional considerations, this

Court could review the matter under its "supervisory powers over the federal criminal process" as mentioned in *Powell,* 105 S.Ct. at 477.

Respectfully submitted,

By:/s/FRANCIS T. MANDANICI
FRANCIS T. MANDANICI
55 Trumbull Street
New Haven, CT 06510

No.

In The

Supreme Court of the United States

October Term, 1985

JOHN C. MANDANICI, JR.
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 29th day of August one thousand nine hundred and eighty-five.

UNITED STATES OF AMERICA,
Appellee,

v. No. 85-1028

JOHN C. MANDANICI, JR.,
Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, John C. Mandanici, Jr.,

Upon consideration by the panel that heard the appeal, it is Ordered that said petition for hearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/Elaine B. Goldsmith
Elaine B. Goldsmith
Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of June one thousand nine hundred and eighty-five.

Present: HONORABLE THOMAS J. MESKILL,
HONORABLE JON O. NEWMAN,
HONORABLE AMALYA L. KEARSE,
Circuit Judges.

UNITED STATES OF AMERICA,
Appellee,

v. Docket No. 85-1028

JOHN C. MANDANICI, JR.,
Defendant-Appellant.

This is an appeal from a judgment of the United States District Court for district of Connecticut, Zampano, *J.*, denying appellant's motions for a new trial and for fingerprinting.

This cause came on to be heard on the transcript of record from said district court and was argued by counsel.

The judgment of the district court is affirmed on the opinion of Judge Zampano below dated January 18, 1985.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

/s/Thomas J. Meskill
Thomas J. Meskill, U.S.C.J.

/s/Jon O. Newman
Jon O. Newman, U.S.C.J.

/s/Amalya L. Kearse
Amalya L. Kearse, U.S.C.J.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA
v. CRIMINAL NO. 82-1103 (RCZ)
JOHN C. MANDANICI, JR.

RULINGS ON MOTION FOR A NEW TRIAL, MOTION TO DISMISS, AND MOTION FOR FINGERPRINTING

On March 4, 1983, defendant John C. Mandanici, Jr., was convicted by a jury on three counts of an indictment charging him with making false statements to the United States Department of Housing and Urban Development ("HUD") in documents relating to an application for federal subsidies under the Section 8 Moderate Rehabilitation Program, 1/ in violation of 18 U.S.C. § 1001. He appealed the conviction, and on February 28, 1984, the Second Circuit reversed the conviction on the first count, and affirmed the convictions on the second and third counts. *United States v. Mandanici*, 729 F. 2d 914 (2 Cir. 1984). Since the ruling of the appeals court, defendant has filed several motions, including motions for a new trial. The court held evidentiary hearings on the motions, and the parties have filed numerous memoranda in support of the their positions. The matter is now ripe for decision.

Defendant applied to receive HUD subsidies for an apartment building he owned at 1477 Central Avenue in Bridgeport. He agreed to perform an estimated $88,000 in rehabilitation work on the property, and in return he was to receive a subsidy from HUD. Specifically, he was entitled to a per-apartment rental of up to 120% of the fair market value. The guilty verdicts that were affirmed by the Second Circuit were based on the government's assertions in the second and third counts of the indictment that (1) in December 1980, defendant falsely stated in an Agreement to Enter into Housing Assistance Payments Contract ("AHAP") submitted to the Bridgeport Housing Authority ("BHA"), that he would perform

$88,000 in rehabilitation work; and (2) in July 1981, defendant falsely stated to BHA in a Housing Assistance Payments Contract ("HAP") that he had actually performed $88,000 in rehabilitation work.

The basis of the motion for a new trial is that the government allegedly failed to disclose a photocopy of a rent calculation worksheet for the 1477 Central Avenue property, apparently prepared by BHA, which indicates that as of July 1, 1981, defendant was receiving 114.8% of the fair rental value of the property, rather than the 120% to which the Section 8 program could have entitled him. The importance of this evidence, according to defendant, is that it strongly supports his testimony at trial that he was not receiving the full 120% subsidy. The relevance of that testimony, he argues, is that he believed there was a "quid pro quo" in the agreement with BHA. Until defendant received the full 120%, he claims, there was no "obligation from a criminal intent point of view to finish the work." Final Memorandum of Law in Support of Defendant's Motion for a New Trial ("Final Memorandum") at 5. As the Court understands defendant's argument, defendant believed that he was not obligated to perform the $88,000 in rehabilitation work until he actually received the 120% figure that he contends was promised in the AHAP contract. Therefore, he contends, the requisite criminal intent is lacking.

The following facts were established at the hearings before the Court.

A grand jury subpoena duces tecum was served on the Executive Director of the BHA, David Gonzalez, on April 1, 1982, requiring him to produce all BHA records relating to its administration of the Section 8 Moderate Rehabilitation Housing Program for HUD. Those documents were provided to Two Federal Bureau of Investigation ("FBI") agents, Edward J. McGoey and Paul Fitzgerald, who delivered them to federal prosecutors. The records were contained in about twenty-five file folders, in a single cardboard box. The folders were standing upright, much as they would be in the drawer of a file cabinet. Each folder contained documents concern-

ing a particular building, and each was marked as to its contents. One file folder was marked "1477 Central Avenue." However, one document that was not in the 1477 Central Avenue file folder was the rent calculation worksheet for that property. The government and defendant's counsel reviewed the files in the box and the 1477 Central Avenue folder extensively in preparing for trial, but the worksheet did not come to their attention.

Upon the return of the box of files to the BHA after the trial and appeal were concluded, the worksheet was discovered by a member of the BHA staff and a BHA consultant on March 16, 1984, when they removed all the files from the box and found documents relating to several projects lying loose on the bottom of the box, under the files that had been upright. They determined that one of the documents was the rent calculation worksheet for 1477 Central Avenue.

The worksheet was prepared by BHA in order to set acceptable rent levels for the property. The contents of the document are not disputed. It shows that the defendant actually received a maximum of 114.8% of the fair market rental for the apartments at 1477 Central Avenue, rather than the 120% ceiling. Further, they indicate that the amount of rehabilitation defendant agreed to do may have been $79,550, rather than $88,000.

The parties disagree vigorously as to the legal effect of the contents of the worksheet. Defendant argues that the exhibit "reveals that the Defendant had no criminal intent and was telling the truth." Motion for New Trial at 2. Defendant's theory is that "[e]ven if the Defendant never intended to complete the work when he signed the HAP contract, that is no longer significant from a criminal intent point of view because he believed that the Government had not fuly paid him as if he had done all the work. Only if the Defendant believed that the Government had paid him the full amount (120%) was there any obligation from a criminal intent point of view to finish the work." Final Memorandum at 5.

The government responds that its "theory and chief concern was not that defendant Mandanici had received 120% of fair market

rents or any other amount, but rather that he made false statements." Government's Proposed Findings of Fact and Conclusions of Law at 8.

Defendant's post-appeal motions include: (1) a motion for a new trial based on the newly discovered evidence; (2) a motion for a new trial based on prosecutorial misconduct; (3) a motion for a new trial based on a failure to receive trial by a fair jury; (4) a motion to fingerprint government prosecutors to determine whether they examined the rent calculation worksheet; and (5) a motion for a sentence reduction. The Court ordered on June 29, 1984, that the motion for sentence reduction would be considered in the event that the Court denied defendant's motion for a new trial. All other pending motions are hereby denied.

The Supreme Court in *United States v. Agurs*, 427 U.S. 97 (1976) set forth three situations in which the familiar rule of *Brady v. Maryland*, 373 U.S. 83 (1964), applies. All concern "the discovery, after trial, of information which had been known to the prosecution but unkown to the defense." *Agurs*, 427 U.S. at 103. First, a conviction "obtained by" perjured testimony that the prosecution knew or should have known about must be set aside if the testimony "could have affected the judgment of the jury." *Id.* Second, a new trial must be granted when the prosecution does not provide material specifically requested by the defendant, if the material might have affected the outcome of the trial. *Id.* at 104-11. Third, the conviction must be set aside when the defense makes a general request for exculpatory evidence, if evidence not produced to the defense "creates a reasonable doubt that did not otherwise exist . . . ." *Id.* at 112.

Defendant claims that *Agurs* applies, and that this situation meets all three of the *Agurs* tests. The government contends that *Agurs* does not apply, but even if it did, defendant meets none of the *Agurs* tests. The Court agrees with the government.

Whether the *Agurs* tests apply to this motion depends on whether the government can be said to have "known" of the rent calcula-

tion worksheet. As the Second Circuit has noted, "the touchstone of the inquiry under *Agurs* is whether the prosecutor's office 'possessed' the information in question at the time of the trial." *Morgan v. Salamack*, 735 F.2d 354, 358 (2 Cir. 1984). The court in *United States v. Hutcher*, 622 F.2d 1083 (2 Cir.), *cert. denied*, 449 U.S. 875 (1980), rejected "a notion of 'possession' which is so elastic as to embrace materials that the prosecution never had in its files, never inspected, and never knew about." *Id.* at 1088.

The evidence demonstrates conclusively the government did not "know about" or "possess" the rent calculation worksheet. There is no indication whatsoever that the government ever reviewed, inspected, or withheld the worksheet. *United States v. Canniff*, 521 F.2d 565, 573 (2 Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976). It seems clear, therefore, that the *Agurs* standards do not apply, and this motion must be decided under the standard of Fed. R. Crim. P. 33. Under Rule 33, defendant is "only entitled to a new trial if the newly discovered evidence is 'such that it would probably lead to an acquittal.'" *United States v. Gonzales*, No. 84-1153, slip op. at 207 (2 Cir. Nov. 1, 1984) (quoting *United States v. Gilbert*, 668 F.2d 94, 96 (2 Cir. 1981), *cert. denied*, 456 U.S. 946 (1982)).

After careful review of the worksheet in the context of the charges against the defendant and the evidence at trial, the court is satisfied that the rent calculation worksheet could not have been material to the defense. It is irrelevant to counts two and three, on which defendant currently stands convicted; therefore, under the standard set forth in Rule 33, it would not probably lead to an acquittal.[2/]

Count two charged defendant with falsely stating that he would perform, prospectively, $88,000 of rehabilitation work on 1477 Central Avenue. The amount of rental subsidies defendant received following that false statement simply has nothing to do with the crime charged. Defendant attempts to address that issue by stating that "the counts are so interwoven that if the thread on one count is broken, then that unwinds the fabric of the entire case causing the evidence on the other count to also unravel." Defendant's Response

to Government's Proposed Findings of Fact and Conclusions of Law at 4. That approach has no basis in the law, particularly under the charges in this case which clearly involve discrete actions, and is hereby rejected.

As to count three, the jury found that defendant represented in the HAP contract that the property had been completely rehabilitated, when in fact it had not been. The simple fact of the matter is that the jury found that defendant made false statements to HUD and BHA. The worksheet does not make the statements any less false.

As to whether the figures affect the defendant's criminal intent, the Court instructed the jury that "[t]he phrase 'with intent to deceive' means to act knowingly, and willfully, with the specific intent to cheat or to deliberately mislead." Jury Instructions at 35-36. Defendant argues that the rent calculation worksheet could have been used to advance the "quid pro quo" defense: he would do less than the full amount of rehabilitation work and BHA would provide him with less than the full 120% amount. But that purported defense is tenuous, and it is highly unlikely that the worksheet would "probably" lead to an acquittal. *See also Mandanici*, 729 F.2d at 920-21 (discussing evidence and proferred defenses to count three). The Court agrees with the government that the amount of subsidies that defendant was actually getting is irrelevant and immaterial to the charge.

Finally, also concerning the materiality issue, it must be noted that the precise amount that defendant actually received pursuant to the Section 8 program was only tangential aspect of the crucial incriminating evidence introduced at the trial. The 120% figure, mentioned sporadically by government counsel during the trial, was not an important part of the proof introduced concerning the essential elements of the crimes charged.

For these reasons, the Court concludes that the worksheet does not reach the required standard of materiality under rule 33.3/

Therefore, the defendant's motion for a new trial on the basis of newly discovered evidence is denied.

Defendant's final argument for a new trial is that because the Second Circuit overturned his conviction on count one, the conviction on counts two and three cannot stand. He notes that the Second Circuit "found that there was no evidence from which a rational jury could have drawn the necessary inferences required to convict the Defendant on that count." Preliminary Memorandum at 18. Apparently the argument is that "the jury was not competant [sic] and rational on a major issue, (that being Count 1)," therefore it must have been incompetent and irrational on all issues. *Id.* The claim is patently without merit and is rejected.

Defendant's motion to dismiss on the basis of prosecutorial misconduct is denied. After considering the testimony at the hearing on this motion, the Court is satisfied that the government maintained high standards of integrity.

The court will rule on defendant's motion for a reduction of sentence after giving counsel a reasonable time to submit moving papers. Defendant shall file his materials in support of the motion within 10 days, and the government shall have 10 days to respond.

III

Accordingly, the defendant's motions to dismiss, for a new trial, and for permission to fingerprint the prosecutors are denied. Decision on the defendant's motion to reduce sentence is reserved.

Dated at New Haven, Connecticut, this 18th day of January, 1985.

/s/Robert C. Zampano
Robert C. Zampano
Senior United States District Judge

1/Mandanici also was indicted on one count of making a false statement to a federally insured bank, in violation of 18 U.S.C. § 1014, but was found not guilty by the jury.

2/Even assuming, *arguendo*, that the *Agurs* standards did apply rather than that of Rule 33, defendant would not be entitled to a new trial, because the rent calculation worksheet could not have been material to his defense. The test of materiality to be applied under *Agurs* depends on which of the three *Agurs* situations noted above is presented. The first, perjured testimony, clearly is inapplicable. The second, when the prosecution does not comply with a specific request for the information, does not apply in this case, because the defense did not specifically request the worksheet. The third situation, when the evidence "withheld" followed a generalized "boilerplate" request by the defendant, *Ostrer v. United States*, 577 F.2d 782, 786 (2 Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979), might conceivably apply if it could be said that the prosecution "knew" of the worksheet. The defense made a generalized request for all documents relating to the AHAP and HAP contracts. However, the third *Agurs* situation carries with it a relatively high standard of materiality: "Since only a general request was made in this case, [defendant's] burden under *Agurs* is to show that the undisclosed evidence, when 'evaluated in the context of the entire record,' 427 U.S. at 112, creates reasonable doubt about his guilt." *United States v. Menghi*, 641 F.2d 72, 74-75 (2 Cir.), *cert. denied sub nom. Hilgert v. United States*, 451 U.S. 975 (1981). In the Court's opinion, viewing the record as a whole, there is no reasonable doubt about the defendant's guilt, even if the worksheet is considered. therefore, a new trial is not mandated by *Agurs*.

3/A pre-*Agurs* case, *United States v. Consolidated Laundries Corp.*, 291 F.2d 563 (2 Cir. 1961), also is arguably applicable to this motion, although it is not cited by defendant. That case involved what the court determined was "negligent suppression" of 43 documents by prosecutors. They had taken possession of a large number of documents before trial, but the documents in question were not produced because "[s]omeone in the Government's employ so arranged them in the files that the prosecutor did not find them when

he attempted to comply with the trial court's order to permit defense counsel to inspect all documents . . . ." *Id.* at 750. The court held that the defendants were entitled to a new trial.

The fundamental difference between *Consolidated Laundries* and the instant case is that no member of the United States Attorney's office or the FBI breached the duty "to keep the evidence of which it was custodian in such a manner that it would be available for use upon the trial by all parties." *Id.* Rather, the rent calculation worksheet, among other records, was disorganized before prosecutors became custodians of the records subpoenaed from BHA. Absent knowledge or reason to know on the part of prosecutors that the records were disorganized upon arrival from BHA, they could not have breached their duty under *Consolidated Laundries.*

A recent case on the negligent suppression of evidence issue is *United States v. Petito,* 671 F.2d 68 (2 Cir.), *cert. denied,* 459 U.S. 824 (1982). The court noted that "[w]here the government's failure to disclose is merely inadvertent or negligent, a new trial is required only if 'there is a significant chance that [the] added item . . . could have induced a reasonable doubt in the minds of enough jurors to avoid conviction.'" *Id.* at 74 (quoting *United States v. Miranda,* 526 F.2d 1319, 1325 (2 Cir. 1975), *cert. denied,* 429 U.S. 821 (1976)). For the reasons discussed above in connection with the analysis of the instant motion under *Agurs, supra* n.2, the Court concludes that even if the government was negligent in failing to provide the rent calculation worksheets to the defense, the motion for a new trial must be denied because the rent calculation worksheet was immaterial.

729 F.2d 914

UNITED STATES of America, Appellee,

v.

JOHN C. MANDANICI, JR.,
Defendant-Appellant.

No. 298, Docket 83-1238.

United States Court of Appeals,
Second Circuit.

Argued Oct. 24, 1983.
Decided March 7, 1984.

Defendant was convicted in the United Stated District Court for the District of Connecticut, Robert C. Zampano, J., of making false statements in matter within jurisdiction of the Department of Housing and Urban Development, and he appealed. The Court of Appeals, Kearse, Circuit Judge, held that: (1) evidence was insufficient to support finding that defendant was guilty on one count because he knew that rehabilitation work that he agreed to perform would not cost $88,000, and (2) evidence amply supported charge that defendant falsely represened in housing assistance payments contract that he would perform a total of $88,000 in rehabilitation work on building whereas he then well knew that rehabilitation work that he performed on said property would not cost $88,000.

Affirmed in part and reversed in part.

1. Fraud key 69(5)

Evidence did not support charge in one count of indictment alleging that defendant's application for rehabilitation program, in which defendant described building, briefly summarized a proposed rehabilitation, and estimated the cost of such rehabilitation, violated statute by making false statements in matter within jurisdiction of the Department of Housing and Urban Development on

ground that defendant knew that rehabilitation work that he agreed to perform would not cost $88,000. 18 U.S. C.A. § 1001.

915

2. Fraud key 69(5)

Evidence amply supported charge that defendant falsely represented in agreement to enter into housing assistancepayments contract that he would perform a total of $88,000 in rehabilitation work on building that he owned under government program. 18 U.S.C.A. § 1001.

3. Criminal Law key 116791)

While it would have been preferable for indictment to set out full text of alleged false statement to government agency in connection with building rehabilitation program, failure to do so did not in any way prejudice defendant, in that there was not indication that grand jury was not presented with defendant's complete housing assistance payment contract, and record was clear that petit jury was informed on several occasions of full text representation defendant made in contract. 18 U.S.C.A. § 1001.

4. Fraud key 69(5)

In prosecution for making false statements in a matter within the jurisdiction of the Department of Housing and Urban Development, evidence was sufficient to support defendant's conviction on count centering on housing assistance payment contract in which defendant warranted that units had been rehabilitated in accordance with terms and conditions of housing assistance payments contract or would be completed in accordance with terms on which units were accepted. 18 U.S.C.A. § 1001.

Harold James Pickerstein, Asst. U.S. Atty., Bridgeport, Conn.

(Alan H. Nevas, U.S. Atty., D. Conn., William I. Shockley, Asst. U.S. Atty., Bridgeport, Conn., on brief), for appellee.

Andrew B. Bowman, Westport, Conn., for defendant-appellant.

Before OAKES and KEARSE, Circuit Judges, and WYZANSKI, District Judge.*

KEASE, CIRCUIT JUDGE:

Defendant John C. Mandanici, Jr., appeals from a judgment entered in the United States District Court for the District of Connecticut, after a jury trial before Robert C. Zampano, *Judge*, convicting him on three counts of making false statements in a matter within the jurisdiction of the Department of Housing and Urban Developement ("HUD"), in violation of 18 U.S.C. § 1001 (1976). Mandanici was sentenced (a) on count three, to a five-year term of imprisonment, execution of which was suspended, a fine of $10,000 to be paid within twelve months, and probation for three years; (b) on count two, to a five-year prison term, execution of which was suspended, and a $10,000 fine to be paid within twelve months, such penalty to be consecutive to that imposed on count three; and (c) on count one, to a five-year term of imprisonment, execution of which was suspended, and probation for two years, to be concurrent with the sentences imposed on counts two and three. On appeal Mandanici contends principally that the evidence presented at trial was insufficient to support his conviction. We agree as to count one and reverse as to that count; we affirm the convictions on counts two and three.

I. BACKGROUND

Mandanici was the owner of an apartment building at 1477 Central Avenue, Bridgeport, Connecticut ("1477 Building" or "Building") as to which he sought and received rent subsidy benefits under the HUD-funded Section 8 Moderate Rehabilitation Program described at 24 C.F.R. § 882 (1980) ("Section 8 Program"). The Section 8 Program, designed to provide decent, safe,

and sanitary housing for low income persons through the moderate rehabilitation of properties owned by private landlords, *id.*, was administered by state Public Housing Authorities ("PHAs") funded by HUD through Annual Contribution Contracts. To participate in the Section 8

916

Program, a landlord was required (1) to have a building needing repair of major component, such as a roof or heating system, (2) to complete rehabilitation work approved by the local PHA, and to spend that work at least $1000 times the number of qualifying units,[1] and (3) to complete and file a number of HUD documents with the local PHA. Upon satisfaction of these requirements, the landlord was guaranteed, for a period of up to 15 years, perqualifying-apartment rental of between 100% and 140% of their fair market rental as determined by HUD.

The HUD documents to be filed by a landlord in connection with the Section 8 Program consisted of three types of printed forms designed to enable the local PHA to evaluate the landlord's rehabilitation proposal and to monitor his completion of the agreed work. The first document was the initial application form ("Application"), in which the landlord described the building, briefly summarized the proposed rehabilitation, and estimated the cost of such rehabilitation. The second, to be completed and filed by the landlord after approval of the Application by the local PHA, was an Agreement to Enter into Housing Assistance Payments Contract ("AHAP Contract"). In the AHAP Contract, which governed the contractural relationship between the landlord and the local PHA during the rehabilitation, the landlord was to (1) provide a more detailed description of the approved rehabilitation and its expected cost, and (2) promise to perform this rehabilitation in accordance with an agreed-upon schedule which stated deadlines for the commencement and completion of the work. The third document to be completed and filed by the landlord was a Housing Assistance Payment Contract ("HAP Contract"), certifying that the approved rehabilitation of theunits qualifying under the Section 8

Program either had been completed in accordance with the provisions of the AHAP Contract or would be completed "in accordance with the terms on which the units were accepted." Once the Hap Contract was completed and signed by both the landlord and an agent of the local PHA, the landlord would begin to receive HUD-funded rent subsidies from the local PHA. Both the AHAP Contract and the HAP Contract bore express warnings that the knowing and willful making of a false statement therein could subject the maker of the statement to prosecution under 18 U.S.C. § 1001.

The Section 8 Program in Bridgeport was administered by the Housing Authority of the City of Bridgeport ("Bridgeport HA"), which had been allocated funding by HUD for a total of 100 apartment units in the Bridgeport area. In October 1980, Mandanici applied to participate in the Section 8 Program by filing an Application for rent subsidies for all 88 units in his 1477 Building. The Application was followed by an AHAP Contract dated December 1, 1980, and, eventually, a HAP Contract dated July 1, 1981.

In 1982, a federal grand jury indicted Mandanici on three counts of making false statements in these three documents.[2] Count one charged that Mandanici had violated 18 U.S.C. § 1001 by presenting in his Application "that he would perform rehabilitation work on property owned by him ..., said work to cost an estimated $88,000 whereas, ... as [Mandanici] then and there well knew, the rehabilitation work that he agreed to perform would not cost $88,000." Count two charged that Mandanici had violated § 1001 by representing in his AHAP Contract "that he would perform a total of $88,000 in rehabilitation work on property owned by him ..., whereas, ... as [Mandanici] then well knew, the rehabilitation work that he performed

on the said property would not cost $88,000." Count three charged that Mandanici had violated § 1001 by representing in his July 1, 1981 HAP Contract "that property owned by him ... had been

rehabilitated in accordance with the terms and conditions of the ... [AHAP] Contract, ... whereas, ... as [Mandanici] then well knew, the work had not been performed in accordance with the terms of the ... [AHAP] Contract."

A. The Evidence at Trial

In his initial application in October 1980, Mandanici gave a brief description of the proposed rehabilitation and estimated its total cost at $88,000. In completing his Application Mandanici was assisted by Joseph Gambino, a registered architect employed by Bridgeport HA to aid Section 8 Program applicants in making cost estimates for their buildings. Gambino conducted a cursory inspection of the 1477 Building, determined that a majorcomponent of the 1477 Building -- the roof -- was in need of repair, and listed on Mandanici's Application the following general work that was necessary to make the units in 1477 building safe, decent, and sanitary: installation of a new roof, repair and replacement of broken windows, patching and plastering of walls, caulking of windows, installation of smoke detectors, elevator repair, insulation or pipes, and repair of the electrical system. Gambino also estimated the cost of the proposed rehabilitation at $88,000, and listed this cost on Mandanici's Application. Mandanici signed the Application, certifying "that the data ... contained in this Application ... are true, correct, and compelte."

Mandanici's Application was approved by Bridgeport HA, which officially informed Mandanici of its approval by letter dated November 12, 1980. This letter reaffirmed that a minimum investment by Mandanici of $88,000 was required for participation in the Section 8 Program.

Gambino then began assisting Mandanici to prepare a final "work write-up," specifying each rehabilitation task to be performed on the 1477 Building and the estimated cost (taken by Gambino from a trade cost-estimate book) of each such task. In the process, Gambino reminded Mandanici that his entitlement to Section 8 Program benefits depended on his spending $88,000. The

work write-up specified a five-ply roof to be placed on the bulding at a cost of $23,000; 500 thermal windows replaced at a cost of $5000; walls of the apartments patched and plastered at a cost of $100 per unit, for a total of $8,800; windows caulked at a cost of $5 per unit, for a total of $440; a crane rented at a cost of $500 per day for seven days to hoist the caulkers to the windows, for a total of $3,500; 192 smoke detectors installed at a cost of $50 each, totaling $9600; kitchen cabinets repaired and replaced at a cost of $2000; carpeting replaced at a cost of $1800; door frames replaced at a cost of $9000; elevator oil packing gland repaired at a cost of $1000; sanitary soil lines insulated at an approximate cost of $4280; broken pipes replaced in the cellar at a cost of $396; electrical system repaired at a cost of $5000; and 344 window screens installed at a cost of $30 each, totaling $10,320. Finally, adminstrative costs in the amount of $3864 were added, bringing the total to $88,000. Mandanici attached this work write-up as Exhibit B to his AHAP Contract, "agree[ing] to complete the rehabilitation ... in accordance with the work write-up."

The AHAP Contract imposed on Mandanici a schedule for commencement and completion of the rehabilitation work. It provided that the work was to be commenced not later than February 1, 1981. It provided that the work was to be completed not later than 60 days after the effective date of the AHAP Contract. Since Mandanici's AHAP Contract was Dated December 1, 1980, the 60-day period for completion expired on January 30, 1981. On December 12, 1980, Mandanici executed and filed his first HAP Contract--a document that was later renegotiated and was not made the subject of a count of the indictment--warranting "that the unit[s]

ha[ve] been rehabilitated in accordance with the terms and conditions of the [AHAP Contract] ... or will be completed inaccordance with the terms on which the unit[s] w[ere] accepted." In addition to this first HAP Contract, Mandanici submitted to Bridgeport HA, sometime in December 1980 or January 1981, an undated letter (the "Undated Letter"] stating that the agreed-upon

rehabilitation had been completed and enclosing bills and receipts in support of that statement. This letter, signed by Mandanici, read as follows:

> In regards to the rehabilitation of the 1477 [Building], we are hereby informing you that we have completed the rehabilitation of our buildings in accordance with your work write up/cost estimate. Enclosed you will find receipts of paid bills docuementing [*sic*] the work and amounts spent on this project.

Upon execution of the December 12, 1980 HAP Contract by Mandanici and Bridgeport HA, Mandanici was guaranteed, over a period of 15 years for 79 Building's apartments, a per-apartment rental of 120% of the fair market rental as determined by HUD. Bridgeport HA began paying rent subsidies to Mandanici on December 15, 1980.

Shortly therafter, Bridgeport HA was notified that HUD had discovered irregularities in the Section 8 Program administered by Bridgeport HA. To cure these irregularities HUD required, *inter alia*, that Mandanici's first HAP Contract be renegotiated. On July 1, 1981 Mandanici completed and filed his renegotiated H.A.P. contract which stated "that the unit[s] ha[ve] been rehabilitated in accordance with the terms and conditions of the [AHAP Contract] ... or will be completed in accordance with the terms on which the unit[s] w[ere] accepted." Despite the renegotiation of Mandanici's first HAP Contract, there was no interruption in his receipt of rent subsidy payments, and the payments to him totaled approximately $402,789.

Notwithstanding the representations made in his Updated Letter and his July 1, 1981 HAP Contract, it is undisputed that Mandanici had not completed the agreed upon rehabilitation by the end of January 1981, nor by July 1 1981, nor even by the time of his trial in February 1983. Further, although Mandaici had presented to Bridgeport HA, with his Undated Letter, documents that he represented were "receipts of paid bills docuementing [*sic*] the work

and amounts spent on this project," and had told Gambino that the work had been done, the government presented as witnesses numerous contractors who testified thatthe work purportedly reflected in these documents had not been done, or had been done for a lower price than that shown, or had been done for one of Mandanici's other buildings.

For example, Charles Hrynewsky, the owner of Carpet City, Incorporated, identified a purported bill for $5,248.69 as merely an estimate that he provided to Mandanici; the only work he had done on the 1477 Building was represented by another document, and the charge as $917. James McCarthy, who owned a crane that he occasionally allowed Mandanici to use, identified certain documents as forms used by his company but denied that he had completed these forms, which Mandanici had submitted to Bridgeport HA as evidence that Mandanici had paid $3500 to a McCarthy's company for the rental of a crane in order to caulk windows. McCarthy testified that he never so rented his crane. John Lockshier, a roofing contractor, testified that although he had provided Mandanici with an estimate of $21,650 for reroofing the 1477 Building with a five-ply roof, he in fact installed a less durable three-ply roof on the 1477 Building and billed Mandanici only $12,865. Robert Jenacarro testified that a purpored bill from his company for $8900 for wall repairs was only an estimate prepared at Mandanici's request; that another purported bill for $465 caulking of windows was also an estimate; and that yet another purported bill for $9600 for smoke detectors was likewise an estimate, and that he in fact sold Mandanici smoke detectors for $3000. Carmen Tortora, Jr., a plumbing contractor,

919

identified a purported bill for $7350 as an estimate he gave Mandanici for repair and insulation of sanitary pipes; Tortora testified that he never performed the work set forth on the estimate, and that Mandanici had asked him for a blank signed invoice, which Tortora refused to give him. Abraham Goldbloom identified a purported bill for $9895 for window screens at only an estimate he had

given and testified that the work he actually performed was work only some $6000. Richard Clark, an electrician, testified that while he was working at another building owned by Mandanici, Mandanici asked him for a receipt for what had been done ($1000) and that in response he gave Mandanici a blank bill marked "paid in full." Clark identified a purported paid bill from him in he amount of $58000 for work allegedly done on the 1477 Building as the blank receipt he had given for the other work. He testified that he had never done any work at the 1477 Building.

Mandanici testified in his own behalf. He testified principally that he intended to complete the agreed-upon rehabilitation but believed, because of the conflict between the completion and commencement dates in the AHAP Contract, that there was no deadline for rehabilitation work begun by February 1, 1981; that he had submitted the Undated Letter only because Gambino had requested it, and that he did not date this letter because hewanted to avoid making a false statement when he represented that the rehabilitation work had been completed; that he had never represented that the estimates attached to the Undated Letter were paid bills; and that between October 1, 1980, and May 10, 1982, he had spent some $56,000 on rehabilitation work at the 1477 Building. On cross-examination. Mandanici admitted, *inter alia,* that much of the $56,000 may have been spent not onthe agreed-upon rehabilitation, but rather on cosmetic repair and routine maintenance that could not be credited toward the required $88,000.

The jury found Mandanici guilty on all three counts charging violations of § 1001. Mandanici's motions for acquittal were denied. This appeal followed.

II. DISCUSSION

On appeal, Mandanici claims principally that there was insufficient evidence to support a conviction against him on any count. Viewing the evidence in the light most favorable to the government, *Glasser v. United States,* 315 U.S. 60, 80, 62 S.Ct. 457, 469,

86 L.Ed. 680 (D1942), we agree with respect to count one and disagree as to counts two and three.[3]

A. Count One

[1] Section 1001 of 18 U.S.C. provides as follows:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by an trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Count one of the indictment charged that Mandanici made a false statement in his initial Application. In that document Mandanici gave the required brief description of the anticipated rehabilitation work, which was as follows:

> Install new roof, replace broken windows, patch and plaster walls, flash and/or caulk windowd, smoke detectors, repair elevator, insulate pipes, repair electrical system.

He stated that the total estimted cost was $88,000. Count one alleged that the Application violated § 1001 because Mandanici knew that "the rehabilitation work that he

920

agreed to perform would not cost $88,000." The evidence does not support this charge.

The government's proof at trial was directed toward the propostions that Mandanici did not spend the moneys he claimed he had

spent, and that he had not intended to spend those moneys. Count one, however, has a different thrust, presumably because the Application form did not require Mandanici to represent (nor did he there represent) that he would complete the proposed rehabilitation or that he would spend the estimated amount. Rather, as the government acknowledges, "the allegation of falsity [in count one] is ... not that [Mandanici] knew he would not perform the work and that he did not intend to spend the money" (Government's brief at 18), but "that Mandanici knew the work [described in the Application] would not cost $88,000" (*id.*). We see no evidence in the record from which a rational juror could have drawn an inference that the work described in the Application could not cost $88,000. The estimate in the Application was prepared with the assistance of Bridgeport HA's Gambino; Gambino's later detailed estimates used a cost-estimate trade book in arriving at the $88,000 figure; and there is nothing in the record to indicate that the work described could not legitimately have cost $88,000. Indeed, the import of much of the government's evidence was that the work would have cost that amount had Mandanici not cheated. Since the charge in count one does not relate to Mandanici's intentions or ot his actions but only to his knowledge of what such work would cost, and since we have found no evidence in the record to show that he had the knowledge alleged, we conclude that the conviction on count one must be reversed.

B. Count Two

We have no such difficulty with the sufficiency of the evidence on count two. That count centered on Mandanici's AHAP Contract of December 1, 1980, in which Mandanici agreed to complete the rehabilitation projects "in accordance with the work write-up attached as Exhibit B." Exhibit B specified the tasks and the amounts to be expended on each. Count two charged that Mandanici falsely represented in the AHAP Contract " *that he would perform a total of $88,000 in rehabilitation work* on [the 1477 Building] whereas ... [he] then well knew [that] the rehabilitation work that *he* performed on the said property would not cost $88,000." (Emphasis added.)

[2] The evidence amply supports this charge. Within weeks of submitting the AHAP Contract, Mandanici represented in his Undated Letter that the work was completed, whereas it was not. At the same time he submitted false documention of his purported expenditures with respect to nearly every task detailed in Exhibit B. The jury could easily infer from the evidence that in the AHAP Contract Mandanici had falsely represented his intentions.

C. Count Three Count three of the indictment centered on Mandanici's HAP Contract dated July 1, 1981, in which Mandanici "warrant[ed] that the unit[s] ... [have] been rehabilitated in accordance with the terms and conditions of the ... [AHAP] Contract ... or will be completed in accordance with the terms on which the unit[s] w[ere] accepted." Count three charged that the HAP Contract contained Mandanici's false representation that the 1477 Building "had been rehabilitated in accordance with the terms and conditions of the" AHAP Contract when he then knew that "the work had not been performed in accordance with the terms of the" AHAP Contract. Mandanici challengees the failure of count three to recite the full disjunctive warranty he made in the HAP Contract, contends that the disjunctive representation he made in the HAP Contracts was literally true, and argues that in any event there was insufficient evidence to support his conviction on this count. We disagree.

[3] Mandanici first attacks his conviction on count three because count three charged that he represented that the work

was completed and omitted the language "or will be completed in accordance with the terms on which the unit[s] w[ere] accepted." While we agree that it is preferable for an indictment to set out the full text of the alleged false statement, the failure to do so in this case did not in any way prejudice Mandanici. We see no indication that the grand jury was not presented with Mandanici's complete HAP Contract, and the record is clear that the petit jury was informed on several occasions of the full text of the representation

Mandanici made in the HAP Contract. There is no indication in the record that either body was led to believe that Mandanici made only the first portion of this disjunctive representation.

[4] Nor do we find merit in Mandanici's claim tht his HAP Contract representation-- *i.e.*, that the work either was completed or would be completed in the future--was literally true. While a defendant may not be convicted under § 1001 on the basis of a statement that is, although misleading, literally true, *see Bronston v. United States*, 409 U.S. 352, 359-62, 93 S. Ct. 595, 600-01, 34 L.Ed.2d 568 (1973), the factual premise for application of this principle here is absent. First, even as to the possibility of future completion, the HAP Contract required that the work be completed on the terms agreed to in the AHAP Contract. The AHAP Contract required that the work be completed not later than 60 days after the AHAP Contract ws entered into--here not later than January 30, 1981. Hence the July 1, 1981 HAP Contract could make no meaningful representation of future completion within the terms to which Mandanici had agreed. Mandanici's testimony that he believed there was no agreed completion date for work commenced prior to February 1, 1981 was an argument for the jury to assess. Its rejection was consistent with the language of the AHAP Contract and with theoverwhelming evidence presented by the government. Indeed, there was ample proof from which the jury could find that Mandanici had no intention of ever completing the agreed-upon work.

CONCLUSION

The conviction on count one is reversed and count one is dismissed. The judgment of conviction on counts two and three is affirmed.

*Honorable Charles E. Wyzanski, Jr., Senior Judge of the District of Massachusetts, sitting by designation.

1. An apartment unit within an approved building qualified for the Section 8 Program if the unit was inhabitated by a low income

individual who was not participating in another HUD-funded rent subsidy program. *See* 24 C.F.R. § § 882.401(c)(2), 882.504(e).

2. In a forth count the grand jury charged Mandanici with making a false statment to a federally insured bank, inviolation of 18 U.S.C. § 1014 (1976). Mandanici was acquitted on this count.

3. We have also examined Mandanici' other claims as to counts two and three found them to without merit.

Supreme Court, U.S.
FILED
DEC 23
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-724

In the Supreme Court of the United States

OCTOBER TERM, 1985

JOHN C. MANDANICI, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
STEPHEN S. TROTT
Assistant Attorney General
MAURY S. EPNER
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

13pp

QUESTIONS PRESENTED

1. Whether petitioner is entitled to a new trial based on his claim of newly discovered evidence.

2. Whether the evidence at trial should be viewed in the light most favorable to petitioner for purposes of the new trial motion.

3. Whether the jury's verdict demonstrates that the jury was biased and irrational.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Brady v. *Maryland*, 373 U.S. 83	5, 6
Moore v. *Illinois*, 408 U.S. 786	5
Strickland v. *Washington*, No. 82-1554 (May 14, 1984)	7, 8
United States v. *Agurs*, 427 U.S. 97	5
United States v. *Bagley*, No. 84-48 (July 2, 1985)	5, 6, 7
United States v. *Brown*, 628 F.2d 471	6
United States v. *Hutcher*, 622 F.2d 1083, cert. denied, 449 U.S. 875	6
United States v. *Lovasco*, 431 U.S. 783	8

Statutes and rule:

18 U.S.C. 1001	2
18 U.S.C. 1014	2
Fed. R. Crim. P. 33	5

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-724

JOHN C. MANDANICI, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A2-A3) is reported at 770 F.2d 158 (Table). The order of the district court (Pet. App. A4-A12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1985. A petition for rehearing was denied on August 29, 1985 (Pet. App. A1). The petition for a writ of certiorari was filed on October 26, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted on three counts of making false statements to HUD,

in violation of 18 U.S.C. 1001.[1] He was sentenced to three five-year prison terms, which were suspended upon payment of fines totalling $20,000. The court of appeals affirmed convictions on two of the counts but reversed on the third. 729 F.2d 914 (1984). Petitioner's subsequent motion for a new trial was denied (Pet. App. A10), and the court of appeals affirmed without an opinion (Pet. App. A2-A3).

The evidence at trial is described in the court of appeals' opinion resolving petitioner's direct appeal (see Pet. App. A13-A27).[2] Petitioner owned an apartment building in Bridgeport, Connecticut for which he sought rental subsidy benefits through a program supervised by the United States Department of Housing and Urban Development (HUD) and directly administered by the Bridgeport Housing Authority (BHA). The program provides subsidies to landlords who (1) own a building needing major repair; (2) agree to complete rehabilitation work approved by BHA costing no less than $1000 per qualifying unit; and (3) execute certain HUD documents. The relevant documents contain express warnings against knowingly making false statements. Upon successful completion of the rehabilitation work, participants are entitled to a rental subsidy providing from 100% to 140% of the fair market rental of the rehabilitated apartment units. Pet. App. A15-A17.

In his application for rental subsidy benefits, petitioner briefly described the proposed rehabilitation and estimated its cost at $88,000. The application was approved by BHA, which informed petitioner that a minimum investment of $88,000 was required to qualify for federal subsidies. Subsequently, petitioner executed the required

---

[1] The jury acquitted petitioner on one count of making a false statement to a bank, in violation of 18 U.S.C. 1014.

[2] Additional evidence was adduced at a hearing on petitioner's motion for a new trial and is described in the district court's order denying that motion (see Pet. App. A4-A12).

HUD contract and submitted it to BHA. Attached to this contract was an exhibit specifying each of the rehabilitation tasks petitioner agreed to undertake, together with their estimated costs, which totaled $88,000. The contract imposed on petitioner a schedule for the commencement and completion of the rehabilitation work. By submitting this contract and the attached exhibit, petitioner certified that he would complete the rehabilitation work in the prescribed manner. In a separate HUD document, petitioner subsequently certified that he had completed the agreed-upon rehabilitation or that he would do so in accordance with the terms contained in his contract with BHA. Upon execution of that agreement, petitioner was guaranteed a subsidy for 79 of the building's apartments, and soon thereafter he began receiving the subsidy payments. Pet. App. A18-A20.

Despite his certifications, however, petitioner neither completed the agreed-upon rehabilitation work nor performed certain of the tasks in the agreed manner. He furnished BHA with receipts from suppliers and subcontractors purportedly establishing that work had been completed. In truth, the work either had not been done, had been completed for a lower price than that shown, or had been performed on another building owned by petitioner (Pet. App. A20-A22). At trial, a jury concluded that petitioner knowingly made false statements concerning the performance of the rehabilitation. The court of appeals affirmed his conviction on two of the three counts. Pet. App. A24-A26.[3]

---

[3] The court of appeals reversed petitioner's conviction on count one, which charged him with making a false statement in his initial application for HUD subsidies. The court concluded that petitioner was not required, in submitting his initial application, "to represent * * * that he would complete the proposed rehabilitation or that he would spend the estimated amount" (Pet. App. A24). Accordingly, it found no evidence in the record to suggest that any statement in that application was false (*ibid.*).

2. Petitioner's present challenge concerns the post-appeal discovery of a BHA document. Before petitioner was indicted, the grand jury subpoenaed BHA records relating to BHA's administration of the HUD housing rehabilitation program. These records were contained in approximately 25 file folders placed upright in a single cardboard box. Each folder contained documents concerning a particular rehabilitation project and each, including the folder relating to petitioner's building, was so marked. The rent calculation worksheet for petitioner's property, however, was missing from the file relating to his property. Thus, while both the government and petitioner's counsel extensively reviewed the files in the box, neither located the missing document prior to trial. Pet. App. A5-A6.

Following petitioner's trial and appeal, the box of files was returned to BHA. At that time, a member of the BHA staff discovered the missing worksheet, together with documents relating to other rehabilitation projects, beneath the upright folders. The worksheet indicates that petitioner received no more than 114.8% of the fair market rental for the apartments in his building, rather than a 120% subsidy. The worksheet also suggests that petitioner may have agreed to do only $79,550 of rehabilitation, rather than work totaling $88,000 (Pet. App. A6).

Petitioner filed a motion for a new trial based on the discovery of the worksheet. The district court denied the motion, ruling that the discovery of the worksheet provided no basis to disturb the conviction (Pet. App. A7). The court of appeals affirmed in an unreported judgment order (*id.* at A2-A3).

ARGUMENT

The court of appeals' decision is correct, is consistent with the opinions of this Court and other courts of

appeals, and does not raise questions of sufficient importance to merit this Court's review.

1. Petitioner contends (Pet. 14-21) that the rent calculation worksheet constitutes newly discovered, exculpatory evidence that entitles him to a new trial. He maintains that the worksheet is material evidence that was suppressed by the prosecution, citing this Court's decision in *United States* v. *Bagley*, No. 84-48 (July 2, 1985). That contention is meritless.

As a general matter, a motion for a new trial based on newly discovered evidence is controlled by Fed. R. Crim. P. 33. The motion typically will be denied unless the defendant can show that the evidence probably would have resulted in acquittal. See *United States* v. *Agurs*, 427 U.S. 97, 111 (1976). However, this Court has applied a different standard where the prosecutor fails to disclose evidence in his possession favorable to the accused. See *Brady* v. *Maryland*, 373 U.S. 83 (1963). This Court has ruled that a prosecutor's suppression of material evidence, requested by the accused and favorable to his case, violates due process (*id.* at 87). Thus, if suppressed evidence is exculpatory and material, a defendant is entitled to a new trial. *Ibid.* See *Moore* v. *Illinois*, 408 U.S. 786, 794-795 (1972). In the present case, the district court properly concluded (Pet. App. A7-A8) that the prosecution did not suppress the worksheet. Thus, the petitioner's request for a new trial is controlled by the general standard applied under Fed. R. Crim. P. 33. Petitioner failed to meet that standard (Pet. App. A8).

The district court specifically found, and petitioner does not dispute, that "government and defendant's counsel reviewed the files in the box * * * but the worksheet did not come to their attention" (Pet. App. A6). The government and petitioner had equal access to the worksheet and were equally ignorant of its existence. Under these circumstances, the government cannot be said to have sup-

pressed favorable evidence. See, *e.g.*, *United States* v. *Hutcher*, 622 F.2d 1083, 1088 (2d Cir.), cert. denied, 449 U.S. 875 (1980) (rejecting the notion that the prosecution must produce "materials that [it] never had in its files, never inspected, and never knew about"). See also, *e.g.*, *United States* v. *Brown*, 628 F.2d 471, 473 (5th Cir. 1980) ("[i]n no way can information known and available to the defendant be said to have been suppressed by the Government") (footnote omitted).

Even assuming that the government had "suppressed" the worksheet and that *Brady* governs this case, petitioner errs in suggesting that the worksheet is material to the determination of his guilt. This Court recently stated that such "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States* v. *Bagley*, slip op. 14 (plurality opinion); slip op. 1 (White, J., concurring). As the district court correctly concluded (Pet. App. A8-A9), the worksheet was not material to petitioner's defense.

Petitioner offers the worksheet as evidence that he did not receive a full allowance under the rehabilitation contract, contending that it supports his claim that he had no criminal intent to deceive HUD and BHA (Pet. 18). According to petitioner, the worksheet shows that he was not criminally motivated in making false descriptions of his rehabilitation efforts because "in his mind he was only getting fair value and what he deserved" (*ibid.*). That defense is facially untenable; petitioner's subjective view of his just deserts does not excuse his intentional false statements. As the district court observed (Pet. App. A9), "[t]he simple fact of the matter is that the jury found that [petitioner] made false statements to HUD and BHA. The worksheet does not make the statements any less false."[4]

[4] The district court's conclusion is reinforced by petitioner's admission at trial that he believed that he was receiving the full subsidy to which he was entitled (see Tr. 1150).

Plainly, the worksheet is not material within the meaning of *Bagley*. Accordingly, petitioner is not entitled to a new trial on the basis of newly discovered evidence.

2. Petitioner argues that the courts below, in considering his motion for a new trial, should have reviewed the trial evidence in the light most favorable to him (Pet. 22-23). In support of his novel contention, petitioner recites a passage from *Strickland* v. *Washington,* No. 82-1554 (May 14, 1984), discussing the standard for determining prejudice in cases involving claims of ineffective assistance of counsel. *Strickland* provides that a new trial is warranted only if the defendant can demonstrate that there is a reasonable probability that, absent counsel's errors, the result of the proceeding would have been different. *Id.* at 24. *Strickland* notes that in assessing whether such a "reasonable probability" exists, a reviewing court "should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law." *Ibid.*

Petitioner mistakenly interprets (Pet. 22) this passage to mean that, if a defendant challenges the sufficiency of the evidence on appeal, that evidence must be interpreted in the defendant's favor, despite the jury's verdict. Quite plainly, the passage simply recognizes that a reviewing court considering an ineffective counsel claim might also be faced with pending challenges to the sufficiency of the evidence and should give those claims separate consideration. It does not alter the well-established standards governing interpretation of jury verdicts. Notably, petitioner's post-appeal new trial motion cannot raise a timely challenge to the sufficiency of the evidence at trial—those challenges were resolved on direct appeal. Indeed, as *Strickland* itself notes, "[t]he high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is

challenged." Slip op. 23-24. Thus, petitioner's claim that the evidence should now be considered in the light most favorable to him is meritless.

3. Petitioner raises a third claim that has nothing whatever to do with his motion for a new trial based on newly discovered evidence. He contends (Pet. 23-25) that the jury that originally convicted him on the three false statement counts was biased and irrational. Because petitioner failed to raise this claim on direct appeal of his conviction, he is precluded from raising it here. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, the claim is meritless.

Petitioner claims that the jury must have been biased and irrational because the court of appeals reversed the jury's factual findings on one of the three counts that resulted in conviction. According to petitioner, the jury's error can be ascribed only to pervasive irrationality and prejudice that infected the whole trial (Pet. App. A23-A24). However, the court of appeals expressly upheld the jury's conclusions on the other two counts (Pet. App. A24-A25), and there is no evidence that the jury harbored any bias against petitioner. Indeed, his claim of bias is directly contradicted by the fact that the jury acquitted him on one of the four counts charged in the indictment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

MAURY S. EPNER
Attorney

DECEMBER 1985

☆ U.S. GOVERNMENT PRINTING OFFICE: 1985—491-507/20101

Supreme Court, U.S.
FILED
JAN 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

NO. 85-724

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JOHN C. MANDANICI, JR.
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF OF THE PETITIONER

Francis T. Mandanici
55 Trumbull Street
New Haven,CT. 06510
(203) 562-5447

Counsel for Petitioner

BEST AVAILABLE COPY

23 pp

TABLE OF CONTENTS

Table of Authorities i

Argument i

TABLE OF AUTHORITIES

Cases:

Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) 1,2

United States v. Bagley, 473 U.S. ___, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) 1,2

On pages 2-7 of the Prosecution's Brief in Opposition, the Prosecution persistently refers to the earlier evidentiary review provided by the Court of Appeals in that Court's initial decision regarding the Petitioner's earlier claims on direct appeal that the evidence on all counts was insufficient to convict him. However, that earlier decision by the Court of Appeals did not concern the present Brady and Bagley issues but rather only concerned the sufficiency of evidence issue, and the Court of Appeals explicitly stated in its earlier decision that the evidentiary review it was providing was based on "(v)iewing the evidence in the light most favorable to the government" (Petitioner's Appendix to his Petition, p. A 22). This approach of the Prosecution in applying the Court of Appeals earlier and clearly pro prosecution review of the evidence to the

present Brady and Bagley claims repeats and accentuates a key error made by the lower courts concerning the present Brady and Bagley claim. As mentioned in the Petition for Certiorari, pp. 22-23, that error is that the lower courts in making a review of the evidence concerning this present Brady and Bagley claim relied heavily on and incorporated the Court of Appeals earlier review of the evidence made in the light most favorable to the Prosecution when the Court was deciding the earlier sufficiency of evidence claims on direct appeal. The Petitioner has claimed that a Brady and Bagley review of the evidence should not be made in the light most favorable to the Prosecution. Said earlier decision by the Court of Appeals is contained on Pages A13-A27 of the Petitioner's Appendix to his Petition and every reference by the

Prosecution in its brief to said pages is primarily a reference to a review of the evidence made in the light most favorable to the Prosecution.

On page 2, line 12 of the Prosecution's brief, it is stated that the Petitioner "sought rental subsidy benefits". However, the trial court itself noted that it was government housing officials who approached the Petitioner. The trial court stated that "Well, I had Mr. Gonzalez (a Prosecution witness and former head of the local federally funded housing authority, the B.H.A.) or -- I'm sorry -- I don't have my record in front of me. He said the (housing) situation was so desperate in Bridgeport that they went to Mr. Mandanici and said 'Please take these people' and I had a state official come in and said that was a violation of law to put people in housing without a contract, but the situation

in Bridgeport was so desperate that they kind of overlooked it" (Sentencing Transcript of June 10, 1983, p. 26). The Court had earlier noted that there was a dire need of housing in Bridgeport for low income people. (Ibid pp. 8, 16).

On Page 2, lines 22-23 of the Prosecution's Brief, it is stated that the Petitioner was only entitled to rental subsidies upon successful completion of the rehabilitation work. However, the final H.A.P. contract (Govt. Trial Exhibit 4), upon which the Petitioner was indicted (Count 3), does not contain a certification by the Petitioner that the work was completed but rather states in Sec. 1.3 (b) that the units have "been rehabilitated in accordance with the terms and conditions of the agreement to Enter into Housing Assistance Payments Contract (Agreement) or will be completed in

accordance with the terms on which the unit(s) was accepted" (emphasis added). Thus the final H.A.P. contract upon which the Petitioner was indicted in Count 3 did not require that all the work be completed.

On page 2, lines 23-24 of the Prosecution's Brief, it is stated that the Petitioner was entitled under the new Modern Rehabilitation program to rental subsidies from 100% to 140%. This again is an assertion adopted from the Court of Appeals evidentiary review made in the light most favorable to the Prosecution. However, no witness at trial ever testified that the Petitioner was told he would get less than 120% of the fair market rent under the new program. In fact, a Prosecution witness, David Gonzalez, who had been the director of the locally federally funded housing agency, the B.H.A., testified that prior to the

government housing contracts with the Petitioner which were involved in the present case, the Petitioner was already receiving 110% of the Government's version of the fair market rent pursuant to an earlier program entitled the Existing Section 8 program (Trial Trans. of February, March 1983, hereafter entitled T., pp. 178-179). Under that earlier Existing Section 8 Program, no rehabilitation or repair was required. Gonzalez testified for the Prosecution that the purpose for the Petitioner doing the rehabilitation work involved in the case was to qualify under new contracts (the subject of Counts 2 and 3 of the Indictment) for a new program entitled Modern Rehabilitation where he would receive another 10% of the Government's version of the fair market rents bringing his rental subsidy from 110% to 120% of

the said market rent for each unit (T. pp. 178-179). Gonzalez testified that the Petitioner did receive the 120% of the Government's version of the fair market rents under the new program (T. p. 179). Also, not only was the Petitioner never told he might get less than the 110% he was already receiving if he did the extra rehabilitation, but he was led to believe he could get 140% of the Government's version of the fair market rent. Gonzalez testified that he attempted to get the 140% from his H.U.D. supervisors but was unable to do so (T. pp. 189-193). It should be noted that the said fair market rent is determined solely by the Government and not by a neutral party (Hearing transcript of June 19, 1984, p. 117). In the earlier stages of the new program under the initial H.A.P. contract in December, 1980, the Petitioner did re-

ceive 120% of the Government's version of the fair market rent (T. pp. 179, 1150). That December 12, 1980 H.A.P. contract was not the subject of any count of the indictment (obviously because it was signed only 11 days after the Petitoner promised to do the work and no one would expect him to do the work in 11 days). Later, on July 1, 1981, the local federally funded housing authority, the B.H.A., presented the Petitioner with a new H.A.P. contract which was the subject of Count 3 and which contained lowered rents. The Petitioner was shown the new lowered rents and was told that if he did not sign the new contract then he would be left with 70 poor families already in the building under the program (Petitioner's testimony, T. pp. 1146-1149, 1168-1169).

On page 2, line 28 of the Prosecution's Brief, it is stated that it was the Petitoner who estimated the costs

of rehabilitation at $88,000.00. However, the Court of Appeals, even when it reviewed the evidence in the light most favorable to the Prosecution, held that it was not the Petitioner but a local federally funded housing official, Joseph Gambino, who did the detailed estimates from a cost estimate trade book (Petitioner's App. p. A24). It should be noted that the con racts that were the subject of the indictments were form contracts drafted by the Government (Govt. trial Exhibits 3, 4) and that various government housing officials stated that the pertinent Section 8 regulations were complicated (T. p. 33), were incomplete and that the matter involved a pilot program and that the paperwork was overwhelming and at times H.U.D. superiors provided different and contradictory answers (T. pp. 355-356). Thus the simple picture of the Section 8 program provided in the

Prosecution's Brief is incomplete.

On page 3, line 18 of the Prosecution's Brief, it is stated that the Petitioner did not complete the work. However, a primary reason he did not complete the work was that he had counted on the promised higher rents to pay for the rehabilitation and he did not get all that he was promised (T. pp. 975-978, 981, 997-998, 657).

On page 3, line 20 of the Prosecution's Brief, it is stated that the Petitioner gave receipts to the B.H.A. However, the Petitioner testified that the matters that he did give were estimates or proposals and that he left said matters in a folder in his office for B.H.A. personnel to pick up periodically even when he was not present (T. pp. 758, 763). B.H.A. personnel testifying as Prosecution witnesses clearly stated that even when they received a copy of the undated letter

from the Petitioner referring to completed work, the Petitioner told them that the work was not done (T. pp. 181-182, 305, 336, 339, 342, 345, 346, 370). A B.H.A. official, Joseph Gambino, testified as a Prosecution witness that he got what he described as receipts in a seriatim fashion (T. pp. 287-288). Gambino testified that he received from the Petitioner in December 1980, January 1981, a copy of the undated letter referring to said matters as being receipts (T. p. 303). However, of all the ten so called receipts, only one was marked as a receipt, Govt. trial Exhibit 16, but that was not in existence in January 1981. The reason that said matter might initially appear to be an estimate or receipt involved with the housing program is due to confusion rather than criminal intent. The confusion involved an electrician being paid $1,000.00 by the Petitioner for work for the Peti-

tioner at another location, and the Petitioner requesting him to provide a written estimate for repair work at the Petitioner's apartment house. The electrician, Richard Clark, testified for the Prosecution that he did work for the Petitioner at another location in which he received $1,000.00 prior to doing the work (T. p. 482-483, 488). He then worked four weeks on the project (T. p. 489), and then left the job after the Petitioner refused to give him more money (T. pp. 483. 489). He testified that at the time the Petitioner refused to give him more money, the Petitioner asked him for a receipt for the work he had done (T. pp. 483-484). He testified that he then gave the Petitioner a piece of his letterhead on which he (Clark) "signed it paid in full for $1,000.00." (T. p. 484), and then he told the Petitioner to fill in the details (T. p. 484).

Clark then identified that paper as Govt. Trial Exh. 16, which revealed four lines of typing concerning electrical work for an 88 unit apartment house, and then a typed figure of $5,800.00 and then his signature and writing stating paid in full. (T. p. 484). He testified that he did not do any of that work listed in the exhibit and that he could not recall being asked to provide any estimate for work tc be done at the Petitioner's apartment building (T. p. 485, 490). Clark identified Defense Trial Exh. C as the check he received from the Petitioner representing the $1,000.00 payment and he testified that he received that payment in February, 1981 when he started said work (T. p. 487). The check reveals a date of February 2, 1981. Thus Clark began the work in February and finished

it four weeks later in March, 1981, at which time he gave the Petitioner a receipt for the work he had done and then he stopped doing any more work. Thus, the Clark document which came into existence in March, 1981, was not in existence when the copy of the undated letter was submitted in early January, 1981.

On page 3, line 23 of the Prosecution's Brief, it is stated that the work was done at a lower price. However, Sec. 1.5(a)(2) of the A.H.A.P. contract (Count 2, Govt. trial Exh. 3) specifically states that the work could be performed at a lower cost resulting in lowered rents. Even the trial court noted that the contracts were flexible and less work resulted in less rents (T. p. 1164).

On page 4, line 13 and page 5 lines 30-35 of the Prosecution's Brief, the Prosecution alleges that the Petitioner's

trial counsel (Andrew Bowman) reviewed the files in the box prior to trial and the Prosecution further alleges that the Petitioner does not now dispute that assertion that Bowman had access to the box containing the rent calculation. However, in Petitioner's Petition For Certiorari, p. 11, lines 14-16, he clearly stated that Bowman "was shown documents set out on a table by the Prosecutor but never shown the rental calculations or any exhibits to the contracts concerning rent, nor did he mention that he ever was shown a box". In said Petition, p. 12, lines 25-27, the Petitioner also refers to the hearing testimony of the F.B.I. agent in charge of the evidence in the case and the Petitioner stated in said Petition that on "one occasion he (the F.B.I. agent) removed the Petitoner's folders from the box and brought them to an office for

Attorney Bowman to review but he could not recall telling Bowman about the box." Thus it is absolutely clear; as previously mentioned by the Petitioner in his Petition, that Bowman never saw the box, but only the folders that had been taken by the F.B.I. agent from the box in one room and then taken to another room where Bowman was located.

On page 6, third from the last line of the Prosecution's Brief, it is stated that the District Court observed that the "simple fact of the matter is that the jury found that the Petitioner made false statements". However, the key element of the crime charged was that the Prosecution was required to prove the Petitioner knowingly and willfully made these statements. As mentioned in the earlier Petition, p. 17, the crime charged is not a strict liability crime but rather requires proof of bad faith or evil intent or evil motive

or bad intent or bad purpose or evil intent without justifiable excuse.

On page 6, footnote 4, of the Prosecution's Brief it is stated that the Petitioner admitted at trial that he believed he was receiving the full subsidy. However, as mentioned in the earlier Petition, p. 6, lines 31-32, the Petitioner testifed he believed he was getting the promised 120% when he signed the first H.A.P.contract in December, 1980, which was not a subject of any count of the indictment and which was signed only 11 days after he promised to do the work. In July, 1981, when he was presented with the second H.A.P. contract (count 3) he was told he was getting lower rents and lowered units (T. pp. 1146-1148).

On page 8, lines 4-12 of the Prosecution Brief, it is asserted that the Petitioner's claim conerning the irrational jury was not properly preserved in the

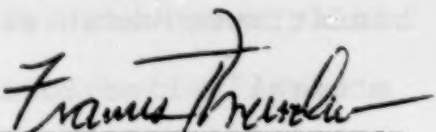
earlier direct appeal and therefore waived. However, the Petitioner could not logically raise the issue until a court, either the District Court or Court of Appeals ruled that the jury was irrational on one of the counts. Furthermore, this alleged waiver was never raised at the District Court or Court of Appeals level and thus it can be considered waived by the Prosecution.

On page 8, last 3 lines prior to conclusion, of the Prosecutions Brief, it is stated that the not guilty verdict on the fourth count contradicts the Petitioner's claim that the jury was irrational. The primary reason the jury returned a not guilty verdict on Count 4 was because the trial court excluded a written memo made by a bank employee which was the primary evidence in that count and which obviously had not be excluded from the grand jury (T. pp. 517-528). The bank

employee then testified for the Prosecution that the Petitioner orally told him that the rehabilitation work for the new Section 8 program had not yet been performed (T. p. 532),which clearly contradicted the Prosecution's claims in the indictment which stated that the Petitioner orally lied to the said bank employee by telling him that all the work had been done. Under these circumstances, it would not only be irrational but almost insane for the jury to return a guilty verdict on this count. Also, this is not like an inconsistent verdict situation where a verdict could go either way and a jury could be showing lenity by returning a not guilty verdict even though the evidence was sufficient to convict. Here, on the not guilty count, there was no evidence which could justify a conviction since the bank employee's testimony contradicted the indictment. The jury still was irrational,

and the inherent bias is not lessened since the jury could naturally feel that hitting the Petitioner with 3 felony convictions was severe enough without hitting him with another one.

RESPECTFULLY SUBMITTED,
The Petitioner

By 

Francis T. Mandanici
His Attorney
55 Trumbull Street
New Haven, CT 06510
Tel: (203)562-5447
Member of the Bar of
The Supreme Court